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Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DIANE HERCEG and ANDY VINES,
Petitioners

v.

HUSTLER MAGAZINE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the article "Orgasm of Death" constitute an incitement to lawless conduct which was not protected by the First Amendment?

2. Is the test of incitement set forth in *Brandenburg v. Ohio,* and its progeny the correct test in a civil action for wrongful death resulting from non-political speech?

LIST OF PARTIES

The caption on the front cover of this Petition contains a complete list of the parties.

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OPINIONS BELOW

1. This District Court issued four opinions in the course of this litigation. The opinion granting Respondent's Rule 12 Motion, but granting Petitioner leave to amend is published at 565 F. Supp. 802. The opinion denying Respondent's renewed Rule 12 Motion is published at 583 F. Supp. 1566. The opinion granting Respondent's Motion for Summary Judgment, in part, and denying it, in part, is unpublished and is reproduced as Appendix B-1. The opinion denying Respondent's Motions for Judgment Not Withstanding the Verdict and for a New Trial is unpublished and is reproduced as Appendix B-2.

2. The opinion of the Court of Appeals is published at 814 F.2d 1017 and is reproduced as Appendix A.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Court of Appeals was issued on April 20, 1987. No Motion for Rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

(i) Grounds of Jurisdiction:

The District Court had jurisdiction of this case on the grounds of diversity of citizenship.

(ii) Statement of Facts:

The August 1981 issue of Hustler Magazine included an article entitled "Orgasm of Death." (PX-1A). The contents of the article included a detailed description of a sexual practice known as "autoerotic asphyxiation"—hanging oneself while masturbating. (*Id.*) The article contained a number of warnings of dangers associated with the practice, but, interspersed with the warnings were glowing descriptions of the "exhilarations" achieved by those who engage in the practice. (*Id.*).

The record demonstrates that Hustler knew that its magazine was read by minors. (IV-12). By some means not disclosed in the record a copy of the August 1981

issue fell into the hands of Troy Daniel Dunaway, the fourteen-year-old son of Diane Herceg. (III-40). A psychiatrist called by the Plaintiffs described Troy as a normal fourteen-year-old boy. (IV-121). Troy read the article, was attracted by the exhilaration, and, as children are prone to do, ignored the warnings. (III-39). He decided to attempt the practice described in the article.

Early on the morning of August 7, 1981, Troy's brother, Tyler, and Troy's closest friend, Andy Vines, arrived at the Herceg residence. (III-26). Tyler had spent the night at Andy's house. (*Id.*). The boys intended to go swimming and wished to invite Troy. (*Id.*). Troy's mother, however, told them that Troy had worked late that night before and asked the boys not to wake him. (*Id.*).

At 11:00 a.m. Troy had still not awakened, and Andy and Tyler became concerned. (III-38). They knocked on Troy's bedroom door, but the door was locked, and he did not answer. (*Id.*). Tyler then called his mother, Diane Herceg. (III-39). She suggested to Tyler that Troy was simply playing a game with him. (III-26). Tyler then went outside and looked through the window into Troy's bedroom. (IV-104). He saw nothing. (*Id.*).

Andy also looked through the window. (III-39). At first, he saw nothing. (*Id.*). However, as he was removing his head from the window, he happened to glance in the direction of the closet. (III-40). He quickly climbed through the window. (*Id.*). Inside he found Troy's nude body hanging by its neck in the closet. (*Id.*). At Troy's feet was the August 1981 issue of Hustler magazine. (*Id.*). The magazine was open to the article "Orgasm of Death." (*Id.*).

The Plaintiffs called two expert witnesses to testify concerning the characteristics of the article. Bob Rogers, former head of the Department of Journalism at Texas A. & M. University, found the warnings in the article to be contradicted by the larger editorial note describing the purposes of the article. (IV-40). He testified that the warnings were "rendered a sham" by the larger editor's note. (IV-50). He further testified that the article could quite easily incite a fourteen-year-old or younger child to attempt the practice described therein. (*Id.*).

Dr. Seth Silverman, a licensed psychiatrist, testified that, although there was no language in the article explicitly urging the reader to engage in the practice, such urging was implicit in the article. (IV-138). The article "does incite and it provokes and it stimulates an immediate action to reenact this particular event." (IV-139). The witness himself found the article "stimulating," became "curious to know how the whole thing was set up," and found it "incredibly frightening" that he would react this way. (IV-150-1). Adolescence is a time of risk taking, and a typical adolescent would find even the warnings provocative. (IV-151). They tend to heighten the stimulation. (IV-152).[1] Many parts of the article imply that "you can get away with it—if you're good at it." (*Id.*; IV-157). The references to the "overpowering feeling of pleasure" supposedly achieved by those who engage in the practice and similar references "tend to increase in intensity and frequency towards the end of the article."

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1. *Cf., Preliminary Draft Report of the President's Commission On Obscenity and Pornography* (hereinafter "President's Commission"), Vol. I, Chpt. 5, p. 113 (1986): "None of us has the least doubt that sexual violence is harmful, and that general acceptance of the view that "no" means "yes" is a consequence of the most serious proportions."

(IV-159). The witness concluded, based on reasonable medical probability, that the article caused Troy to commit the act which resulted in his death. (IV-148).[2]

The case was submitted to the jury on special interrogatories embracing the interpretation urged by Respondent of this Court's *Brandenburg* opinion. The jury found that the article "Orgasm of Death," had incited the deceased to commit the act which caused his death. The District Court overruled Respondent's Motions for Judgment N.O.V. and for a New Trial and entered judgment on the jury verdict. (Appendix B-2, p. 42a).

The United States Court of Appeals for the Fifth Circuit reversed. The Court first recognized that the jurors apparently believed based upon sufficient evidence that the deceased "had read the article immediately before he entered in the acts that proved fatal and that his reaction to the article was not the result of any clinical psychological abnormality." 814 F.2d at 1021. However, the Court, citing *Bose Corporation v. Consumers Union* felt constrained to conduct an independent review of "the jury's mixed finding of fact and law that the article culpably incited [the deceased's] behavior." 814 F.2d at 1021. The Court then construed this Court's *Brandenburg* opinion as requiring proof that: (1) the practice described in the article is "a lawless act;" (2) that the article "advocated this act;" (3) that the article went "beyond 'mere advocacy' and amounted to incitement;" and (4) that the "incitement was directed to

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2. *Cf., President's Commission, supra,* Vol. I, Chpt. 5, p. 109: "[W]e have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence."

imminent action." 814 F.2d at 1022. The Court, however, emphasized that the fourth element is most important: "The crucial element to lowering the First Amendment shield is the imminence of the threatened evil." 814 F.2d at 1022.

The Court then focused exclusively on the text of the article, emphasized the warnings contained in the article, ignored the numerous descriptions in the article of the intense physical pleasure which can supposedly be achieved through the practice, and concluded that "no fair reading of [the article] can make its contents advocacy, let alone incitement to engage in the practice." 814 F.2d at 1023. Curiously, although recognizing that the jury was "entitled to consider" the evidence showing that the deceased performed the fatal act immediately after reading the article, the psychiatric testimony about the likely effect of such an article, and the probable state of mind of the deceased, the Court made no attempt to analyze this evidence. Equally curiously, the Court restricted its discussion to the text of the article and made no mention of the extremely provocative photograph of several nude women apparently engaged in the practice that was centered in the first page of the article.

REASONS THE WRIT SHOULD BE GRANTED

A. The Court of Appeals Misconstrued *Brandenburg*:

The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. With the exception of the line of cases relating to libel actions, this Court has written almost nothing concerning the extent to which the First

Amendment provides a shield against tort liability for damages caused by speech. Nevertheless, tort litigation for damages caused by speech has become increasingly common.[3] This case provides an opportunity for this Court to begin providing guidance to the lower courts for striking the balance between First Amendment values and the equally important value of providing a seriously injured party with a remedy against the person whose conduct caused the injury.

Petitioners' theory of the case at trial was that Hustler stimulated, enticed, or "incited" the deceased to engage in exceedingly dangerous conduct which was likely to result in and did, in fact, result in his death. The jury believed Petitioner's theory of the case, and the Court of Appeals found the evidence sufficient to support the facts (as opposed to mixed findings of fact and law) found by the jury. 814 F.2d at 1021. The Court of Appeals further implicitly assumed that Petitioner's theory constituted a viable ground for recovery under State law. Nevertheless, the Court of Appeals conducted an independent review of the record and held that tort liability under these circumstances could not withstand First Amendment scrutiny.

The Court of Appeals accepted Hustler's contention that *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827,

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3. *See, e.g.,* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975); Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. App. 1982), *cert. denied,* 459 U.S. 1226 (1983); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982); Hilker, "Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis," 52 S. Cal. L. Rev. 529 (1979); *Annotation,* "Liability for Personal Injury or Death Allegedly Resulting from Television or Radio Broadcast," 20 A.L.R. 4th 327 (1983).

23 L.Ed.2d 430 (1969) was the controlling precedent. It is important to take note of the sharp contrast of facts between *Brandenburg* and the present case. The speech involved in *Brandenburg* was undeniably political in nature. This Court has frequently stated that political speech is "at the heart of First Amendment protection." *First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). By contrast, speech concerning obscure sexual practices intended primarily for "adult" entertainment can hardly be said to be at the core of the values that the framers of the First Amendment intended to protect. Perhaps even more importantly, *Brandenburg* concerned the circumstances under which a state could intervene and punish speech that had a potential to cause harm *before* any harm actually occurred. By contrast, this case involves an attempt by the injured parties to recover damages for harm that *actually occurred* as a result of the speech. This Court has never analyzed whether *Brandenburg* is applicable to this situation and, if so, how it is to be applied. *Cf. Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931) (suggesting that the First Amendment provides more protection against "prior restraint" than against punishment after the fact.) Finally, it must be remembered that *Brandenburg* was a criminal prosecution. Despite the language in *New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), it seems self-evident that criminal prosecution of a speaker provides a greater threat to First Amendment values than a mere civil lawsuit.

Nevertheless, even assuming that it is correct to treat *Brandenburg* as the controlling precedent, the Court of Appeals has misconstrued that case. The Court interpreted *Brandenburg* as requiring a four-part test:

1. The article must "advocate" autoerotic asphyxiation;
2. The article must go beyond "mere advocacy" and amount to incitement; and
3. The article must have been directed toward "imminent action";
4. Autoerotic asphyxiation must be a "lawless" act.

The Court of Appeals held that the article did not "advocate" that anyone engage in the practice therein described, and was therefore protected under its reading of *Brandenburg*. *Brandenburg*, however, involved a prosecution under a state statute which proscribed "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." 395 U.S. at 444-5. The primary issue presented was whether a a State can punish "mere advocacy" of violent or unlawful methods of achieving political goals. This Court concluded that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. It is important to note that the Court did not express any opinion on whether a State could (or could not) punish other forms of speech which were "directed to inciting or producing imminent lawless action. . . ." The essence of the decision is that a State can intervene to punish an immediate and impending evil. The manner or means that a defendant may have used to bring about the impending evil would seem to be a matter of little relevance. Nothing in *Brandenburg*

requires that "advocacy" be the means used to bring about the evil. *See also, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[A] finding that his public speeches were likely to incite lawless action could justify holding him responsible. . . ." 458 U.S. at 927. No requirement that the speech "advocate" such action.)

However, even if "advocacy" is an element of the test established in *Brandenburg*, the present article meets that test. It is true that the article does not explicitly instruct the reader to attempt the practice. Nevertheless, the article contains numerous glowing descriptions of the pleasures supposedly achieved by means of the practice. Thus, the article contends that those who engage in the practice achieve "exhileration," "an overpowering feeling of pleasure and oblivion," a high "not unlike the high produced by drugs or some religious rights," and "thrills." As noted by Dr. Silverman, these references "tend to increase in intensity and frequency towards the end of the article." Hustler's argument amounts to a contention that advocacy must be explicit and that there is no such thing as implicit advocacy. On the contrary, advocacy merely requires that one "plead in favor of" something. *Webster's Ninth New Collegiate Dictionary*, at 60 (1985). Surely, providing a glowing list of the benefits involved in a practice constitutes pleading in favor thereof. If *Brandenburg* requires advocacy, it surely does not require that the advocacy be explicit.

The Court of Appeals next emphasized the *Brandenburg* requirement that the speech be "directed to . . . imminent action." Once again, the Court's reading of *Brandenburg* is strained. It seems plain that speech can be "directed to inciting or producing imminent lawless

action" without explicitly urging the listener to "do it *now*." This record shows that the article did, in fact, produce immediate action. The magazine was found open to the article at the feet of the deceased. The jury could believe that the deceased not only read the article, but did so immediately before he attempted the act. This Court suggested in *NAACP v. Claiborne Hardware Co., supra,* that if the "language had been *followed* by acts of violence, a substantial question [of liability] would be presented." 458 U.S. at 928 (emphasis added). Thus, the requirement of "imminence" is more concerned with whether the speech actually produced immediate action or was likely to do so. Even under *Brandenburg,* there is no requirement that the speaker explicitly urge that action be taken immediately. The present article did, in fact, produce immediate action.

Although the Court of Appeals expressed no opinion on the issue, Hustler contended that the article did not produce any "lawless action." Hustler construed "lawless action" to mean *illegal* action and urged that the action produced must constitute a violation of the Penal Code. The long line of cases which preceded *Brandenburg* required only a "clear and present danger of *substantive evils*." *Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L.Ed. 470 (1919). *Brandenburg* arguably modifies those cases by requiring a more direct and immediate connection between the speech and the evils which government is entitled to prevent. However, *Brandenburg* was surely not intended to alter the previous cases with respect to the *types* of evil a government is entitled to prevent. The word "lawless" is used in *Brandenburg* simply because that was the only evil which was pertinent under the facts of that case. *Tinker v. Des Moines Independent*

Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969), decided in the same year as *Brandenburg,* aptly illustrates that a State can prevent speech which creates a danger of evils which do not necessarily constitute a violation of the Penal Code—disruption of classes. Furthermore, Hustler's assumption that "lawless" and "illegal" are exactly synonymous is simply incorrect. Webster's definition of "lawless" lists "unruly" as a synonym as well as "illegal." *Webster's Ninth New Collegiate Dictionary* at 678 (1985). Similarly, the Oxford English Dictionary includes "unbridled" and "licentious" as synonyms for "lawless." 1 *Oxford English Dictionary* at 119 (1979). The death by hanging of a fourteen-year-old boy is surely "lawless action" within the meaning of *Brandenburg.*

B. The *Brandenburg* Test Of "Incitement" Should Be Modified In The Context Of The Present Case:

The absolute view of the First Amendment has long since been rejected. Hustler itself recognizes that there are numerous areas of speech to which the protections of the First Amendment do not extend or extend only to a limited degree. The areas recognized by Hustler includ: (1) obscene material, *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973); (2) fighting words, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942); (3) defamation, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); (4) intolerable invasions of privacy, *Eriznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1973); (5) disruptions of the classroom, *Tinker v. Des Moines Independent Community School District, supra;* (6) in-

citement to imminent lawless activity, *Brandenburg v. Ohio, supra;* and (7) solicitation of illegal activity, *Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations,* 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed.2d 669 (1973). This list is far from complete. To the list should be added: (8) fraud, *See Schneider v. State,* 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939); (9) deceptive advertising, *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. ____, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985); (10) in-person solicitation by a professional, *Ohralik v. Ohio State Bar Ass'n.,* 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); (11) profanity on the electronic media, *Federal Communication Comm'n. v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), (12) commercial speech, *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel, Inc.,* 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976); etc. The involvement of a minor brings substantial (sometimes compelling) State interests into play which further limit the reach of First Amendment freedoms. *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982).

Probably the most common type of civil lawsuit involving speech is a lawsuit for libel or slander. At first blush, libel and slander cases seem only slightly more similar to the present case than *Brandenburg*. However, actions for libel certainly represent the most significant attempt by this Court to reconcile the interests of an injured plaintiff with the interests protected by the First Amendment. Furthermore, one of the major harms stemming from libel or slander is its tendency to spur others to action, i.e., to not hire the Plaintiff, to shun him socially, etc. The essence of Plaintiff's complaint in the

present case is that the article in question spurred action in a much more direct manner. Thus, a useful analogy can be drawn from a review of the line of cases analyzing the relationship between libelous publications and the First Amendment.

This Court long assumed that libel enjoyed no constitutional protection whatsoever. *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L.Ed. 919 (1952) ("Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." 343 U.S. at 266). However, in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), the Court put significant restrictions on the right of a public official to sue for libel:

> The Constitutional guarantees require, we think, a Federal Rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80.

Four years after the *New York Times* case the Court extended its reasoning to embrace any case in which the Plaintiffff was a "public figure." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967). A few years later, a plurality of the Court voted to extend the *New York Times* rule to a report involving

a private Plaintiff "about the individual's involvement in an event of public or general interest." *Rosenbloom v. Metro Media, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971). In *Gertz v. Robert Welch, Inc., supra*, however, the Court retreated from its previous position. The Court recognized that:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation . . .
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose. . . .

418 U.S. at 341. Thus, the Court concluded that:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

418 U.S. at 347. The Court, however, concluded that a showing of actual malice was still required for the recovery of presumed or punitive damages.

In *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. ____, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985) the Court further clarified the law. The Court considered the question of whether the rule announced in *Gertz* applies "where the false and defamatory statements involved do not involve matter of public concern." 86 L.Ed.2d at 597.

The Court noted that the *New York Times* case had involved "one of the major public issues of our time." 86 L.Ed.2d at 600, *quoting, New York Times Co. v. Sullivan, supra,* 376 U.S. at 271. The rationale underlying the *New York Times* case was that "debate *on public issues* should be uninhibited, robust, and wide open." 86 L.Ed.2d at 600, *quoting, New York Times,* 376 U.S. at 270 (emphasis added by the Court in *Dun & Bradstreet*). The Court went on to note that the *Gertz* case, too, had involved "expression on a matter of undoubted public concern." 86 L.Ed.2d at 600. The Court explained that "not all speech is of equal First Amendment importance." 86 L.Ed.2d at 602. Instead, "the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id., quoting, Roth v. United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957). Thus, "it is speech on 'matters of public concern' that is 'at the heart of the First Amendment protection.'", 86 L.Ed. at 602, *quoting, First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978). The *Dun & Bradstreet* Court concluded as follows:

> We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern.

86 L.Ed.2d at 605.[4]

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4. This, of course, was the plurality opinion of three Justices. Chief Justice Burger, concurring, stated the even more restrictive position that *Gertz* is limited to matters of "general public importance." 86 L.Ed.2d at 606. Justice White, concurring, took the even more conservative position that *Gertz* and *New York Times* should be overruled.

Thus, over a period of eighteen years, this Court evolved a test whereby the degree of First Amendment protection afforded an allegedly libelous publication depends on two factors: (1) The nature of the Plaintiff; and (2) the nature of the publication. Thus, if the Plaintiff is a public official or other "public figure", the publication is afforded more protection than if the Plaintiff is a private individual. If the publication involves political or social issues, it is afforded more protection than publications which "do not involve matters of public concern." These factors, the nature of the Plaintiff and the nature of the publication, are balanced against the State interest in awarding damages to the person injured by the publication.

These considerations strongly indicate that the test of incitement found in *Brandenburg* must be modified significantly when applied to the case at hand. As previously noted, *Brandenburg* involved a *criminal* prosecution for speech which was clearly *political* and which had not caused harm, but merely had the *potential* to do so. Many cases, in addition to *Dun & Bradstreet,* hold that political speech is entitled to the highest of First Amendment protection. *Federal Election Comm'n. v. National Conservative Political Action Committee,* 470 U.S. ____, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985) ("Discussion of public issues and debate on the qualifications of candidates are intrical to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . ." 84 L.Ed.2d at 467, *quoting, Buckley v. Valeo,* 424 U.S. 1, 14, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976)); *Carey v. Brown,* 447 U.S. 455, 100 S. Ct. 2286, 65 L.Ed.2d 263 (1980) ("The maintenance of the op-

portunity for free political discussion . . . is a fundamental principle of our constitutional system." 447 U.S. at 467, *quoting, Stromberg v. California,* 283 U.S. 359, 369, 51 S. Ct. 532, 75 L.Ed. 1117 (1931)); *First National Bank v. Bellotti, supra* ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 776-7, *quoting, Mills v. Alabama,* 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L.Ed.2d 484 (1966)). Thus, it is unsurprising that, analogous to the high test of malice required by *New York Times* for a public official to recover for libel, *Brandenburg* required a rather high test of incitement to sustain a criminal prosecution for a political speech. By contrast, speech of the nature presently before the Court, even if not constitutionally obscene and entitled to no protection whatsoever, is not entitled to the full protection afforded political speech. *See Federal Communications Comm'n. v. Pacifica Foundation, supra,* 438 U.S. at 743 (stating that "patently offensive references to excretory and sexual organs and *activities* . . . surely lie at the periphery of First Amendment concern." (emphasis added)); *cf., Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L.Ed.2d 154 (1976) (prominent socialite's divorce was not a matter of "public controversy"). To paraphrase the *Dun & Bradstreet* opinion "there is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide open.' " 86 L.Ed.2d at 604, *quoting, New York Times v. Sullivan, supra,* 376 U.S. at 270. On the other hand, the Supreme Court has recognized that it is "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being

of a minor' is 'compelling.' " *New York v. Ferber, supra,* 458 U.S. at 756-7, *quoting, Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982). Thus, it seems clear that, by analogy to the modification of the *New York Times* "actual malice" test found in *Gertz* and *Dun & Bradstreet,* the *Brandenberg* incitement test should be relaxed in its application to the case at hand. *Cf. New York v. Ferber, supra,* 458 U.S. at 764 (relaxing the *Miller* test for obscenity when applied to child pornography.).

The next step, of course, is to analyze in what manner the incitement test should be modified. The most obvious modification is suggested by *Gertz* itself. The most significant holding of *Gertz* was to modify the "actual malice" test of *New York Times* to simple negligence when the Plaintiff was a private individual. Surely, in a civil case involving non-political speech the *Brandenburg* requirement that the speech be *"directed to* inciting or producing imminent lawless action" should be modified to a requirement that the defendant knew or should have known that his speech would cause severe injury.

A second modification relates to the degree of imminence of the evil spurred by the speech. Here, a useful analogy can be drawn from some of the earliest cases interpreting the First Amendment. The precursor to the *Brandenburg* incitement test is found in *Schenck v. United States, supra.* There, the Court, speaking through Justice Holmes, established (before there was any ordinary test of incitement) a relaxed test of incitement applicable to the exigencies of war time. The defendants were prosecuted for speech which was undoubtedly political. They circulated a pamphlet to draftees urging them to protest the draft. The pamphlet argued, among other things, that

the draft was a clear violation of the Thirteenth Amendment. Mr. Justice Holmes rejected the contention that the convictions violated the First Amendment:

> We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. [citation omitted] The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

249 U.S. at 52. Thus, the original test did not require advocacy of imminent lawless action (as Hustler interprets *Brandenburg*), but merely words creating a "clear and present *danger*" of "substantive evils." *See also, Debs v. United States,* 249 U.S. 211, 39 S. Ct. 252, 63 L.Ed. 566 (1919) (another opinion by Mr. Justice Holmes which restates the "clear and present danger" test as requiring that the words have "as their natural tendency and reasonably probable effect" to bring about an evil which Congress has the right to control.)

In *Dennis v. United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L.Ed. 1137 (1951) the Court provided a further interpretation of the "clear and present danger" test. The Court construed the test as requiring an evaluation of the magnitude of the evil sought to be avoided and the immediacy of the danger. If the evil is sufficiently great, the government may punish speech tending to promote

the evil well before the evil becomes imminent. Thus, the government need not "wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited" before acting. 341 U.S. at 509.

More recently, in the same term of Court in which *Brandenburg* was decided, the Court applied a relaxed incitement test in the context of the public schools. *Tinker v. Des Moines School District, supra.* There, petitioners were suspended from school for wearing black arm bands to publicize their protest of the war in Vietnam. The Court upheld the challenge to the constitutionality of the suspension, but applied a test much less stringent than that found in *Brandenburg.* The Court held that political expression in a public school environment can be prohibited where it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 505, *quoting, Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966). Thus, *Tinker* illustrates that something similar to the "clear and present danger" test is still applicable to political expression under special circumstances. Surely, at a minimum, the *Brandenburg* "imminent lawless action" test should be modified to a "clear and present danger" test in the context of a civil action for non-political speech.

The most recent Supreme Court case involving a claim of incitement, *NAACP v. Claiborne Hardware Co., supra,* lends further support to this conclusion. There, numerous members of the black community of a small Mississippi town engaged in a boycott of white merchants to protest racial inequality. The white merchants filed suit against approximately 150 defendants based on a variety of allegations, including anti-trust violations and a Mississippi common law tort, "malicious interference with a trade

or calling." The Mississippi Courts sustained a recovery based on the latter theory.

The Supreme Court reversed almost all aspects of the judgment. What is relevant here is the Court's discussion regarding the liability of Charles Evers, a leader of the NAACP. Mr. Evers liability was based on four public speeches made by him. Most aspects of the speeches called for unity in the joint effort and for social ostracism of those blacks who violated the boycott. However, at least one of the speeches referred to "the possibility that necks would be broken and to the fact that the sheriff could not sleep with boycott violators at night." 458 U.S. at 927. The boycott had, in fact, involved a few isolated instances of violence, but all such instances were well-separated in time from Mr. Evers' speeches, and there was no evidence that his speeches were the immediate cause of any specific incident. Thus, the Court faced the issue of whether the speeches in question could form the basis of civil liability.

The Court first noted the exact nature of the speech in question:

> Since Respondents would impose liability on the basis of a public address—which predominantly contained highly charged *political* rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

458 U.S. at 926-7 (emphasis added). The Court proceeded to cite with approval both *Schenck* and *Brandenburg*. The Court stated that "a finding that [Evers] public speeches were *likely to incite lawless action* could justify holding him liable for unlawful conduct that in fact

followed within a reasonable period." Id. at 927 (emphasis added). Furthermore, "[i]f that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case . . . the acts of violence . . . occurred weeks or months after the . . . speech." *Id.* at 928. Thus, the Court concluded that the speeches "did not transcend the bounds of protected speech set forth in *Brandenburg." Id.*

Although the Court cited both *Schenck* and *Brandenburg* and explicitly relied on the latter, the test applied was, in fact, much closer to *Schenck*. A requirement that the speech be "likely to incite lawless action . . . within a reasonable period" (*NAACP*) sounds much closer to a requirement of "clear and present danger [of] substantive evils" (*Schenck*) than to a requirement of "directed to inciting or producing imminent lawless action and . . . likely to . . . produce such action." (*Brandenburg*). Thus, in a civil case, even in a case involving purely political speech and a claim of mere economic damages, the Court applied a less stringent test of incitement that that found in *Brandenburg*. Surely, in a case involving physical injury and non-political speech the *Brandenburg* test should be substantially relaxed.

In short, civil liability does not conflict with the First Amendment where a defendant engages in speech which he knows or should know will create a "clear and present danger" of spurring action which causes severe personal injuries or death, and where such injuries or death actually follow within a reasonable period of time.

PRAYER FOR RELIEF

Petitioner urges the Court to grant a Writ of Certiorari and, after hearing the merits, reverse the judgment of the Court of Appeals.

Respectfully submitted,

HAYNES & FULLENWEIDER,
A Professional Legal Corporation

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition For Writ of Certiorari was mailed to David H. Donaldson, Jr., GRAVES, DOUGHERTY, HEARON & MOODY, 2300 Interfirst Tower, P. O. Box 98, Austin, Texas 78767 by U.S. mail, certified, return receipt requested this _____ day of July, 1987.

_____

APPENDIX A

Diane HERCEG, and Andy V.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

HUSTLER MAGAZINE, INC.,
Defendant-Appellant,
Cross-Appellee.

No. 85-2833.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

April 20, 1987.

Mother and friend of adolescent brought action against magazine publisher to recover damages for emotional and physical harm suffered as result of adolescent's death allegedly caused by magazine article which described practice of autoerotic asphyxia. The United States District Court for the Southern District of Texas, Woodrow B. Seals, J., entered judgment on jury verdict in favor of mother and friend and denied publisher's motions for judgment notwithstanding verdict or new trial. Publisher appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) magazine article did not incite adolescent to perform act that led to death by hanging, therefore, it was entitled to First Amendment protection, and (2) imposition of civil liability for damages that resulted from publication of magazine article violated First Amendment.

Reversed.

Edith H. Jones, Circuit Judge, concurred in part, dissented in part, and filed opinion.

David H. Donaldson, Jr., Jack N. Price, Austin, Tex., for defendant-appellant, cross-appellee.

Clinard J. Hanby, Michael M. Essmyer, Haynes & Fullenweider, Houston, Tex., for plaintiffs-appellees, cross-appellants.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An adolescent read a magazine article that prompted him to commit an act that proved fatal. The issue is whether the publisher of the magazine may be held liable for civil damages.

I.

In its August 1981 issue, as part of a series about the pleasures—and dangers—of unusual and taboo sexual practices, *Hustler Magazine* printed "Orgasm of Death," an article discussing the practice of autoerotic asphyxia. This practice entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm. The article included details about how the act is performed and the kind of physical pleasure those who engage in it seek to achieve. The heading identified "Orgasm of Death" as part of a series on "Sexplay," discussions of "sexual pleasures [that] have remained hidden for too long behind the doors of

fear, ignorance, inexperience and hypocrisy" and are presented "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]."

An editor's note, positioned on the page so that it is likely to be the first text the reader will read, states: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia,' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."

The article begins by presenting a vivid description of the tragic results the practice may create. It describes the death of one victim and discusses research indicating that such deaths are alarmingly common: as many as 1,000 United States teenagers die in this manner each year. Although it describes the sexual "high" and "thrill" those who engage in the practice seek to achieve, the article repeatedly warns that the procedure is "neither healthy nor harmless," "it is a serious—and often-fatal—mistake to believe that asphyxia can be controlled," and "beyond a doubt—. . . auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe." The two-page article warns readers at least ten different times that the practice is dangerous, self-destructive and deadly. It states that persons who successfully perform the technique can achieve intense physical pleasure, but the attendant risk is that the person may lose consciousness and die of strangulation.

Tragically, a copy of this issue of Hustler came into the possession of Troy D., a fourteen-year-old adolescent,

who read the article and attempted the practice. The next morning, Troy's nude body was found, hanging by its neck in his closet, by one of Troy's closest friends, Andy V. A copy of *Hustler Magazine*, opened to the article about the "Orgasm of Death," was found near his feet.

Invoking the diversity jurisdiction of a federal court, Troy's mother, Diane Herceg, and Andy V. sued Hustler to recover damages for emotional and psychological harms they suffered as a result of Troy's death and for exemplary damages. Their original complaint alleged that Hustler was responsible for Troy's death on grounds of negligence, products liability, dangerous instrumentality, and attractive nuisance. In response, Hustler filed a motion to dismiss the complaint for failure to state a claim. The district court granted Hustler's motion on the basis that Texas law did not support some of the claims and others were barred by the first amendment, but it noted that the first amendment did not bar claims based on incitement and that it was "conceivable that plaintiffs could prove facts showing that Hustler's article was 'directed to inciting or producing' [Troy's death and] was 'likely to incite or produce' the death." It therefore granted leave to the plaintiffs to amend the complaint "to add an allegation of incitement."[1] The plaintiffs subsequently filed an amended complaint reasserting the claims previously raised and adding an allegation that Troy had read the article and was incited by it to perform the act that resulted in his death. Hustler responded by filing a motion for summary judgment. The district court treated the

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1. *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D. Tex. 1983), relying on *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979) and quoting from *Oliva N. v. National Broadcasting System*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

motion as a motion to dismiss, granted the motion, and dismissed the suit insofar as it was based on any theory except incitement.

The incitement claim was then tried before a jury. Expert witnesses testified on behalf of both the plaintiffs and the defendant about the psychological implications of Troy's behavior and whether the magazine article implicitly advocated the practice it described or was likely to incite readers to attempt the procedure. The jury returned a verdict in favor of the plaintiffs awarding Diane Herceg $69,000 in actual damages and $100,000 exemplary damages and awarding Andy V. $3,000 for the pain and mental suffering he endured as the bystander who discovered Troy's body and $10,000 exemplary damages. Hustler moved for a judgment notwithstanding the verdict or for a new trial, and the plaintiffs moved to amend the judgment to provide for pre-judgment interest. The trial court denied both motions. Hustler appeals, but the plaintiffs do not cross appeal or raise any issue concerning the correctness of the district court order dismissing their other claims.

II.

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas. Under our Constitution, as the Supreme Court has reminded us, "there is no such thing as a false idea. However, pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the

competition of other ideas.'"[2] We rely on a reverse Greshom's law, trusting to good ideas to drive out bad ones and forbidding governmental intervention into the free market of ideas. One of our basic constitutional tenets, therefore, forbids the state to punish protected speech, directly or indirectly, whether by criminal penalty[3] or civil liability.[4]

The Supreme Court has recognized that some types of speech are excluded from, or entitled only to narrowed constitutional protection. Freedom of speech does not protect obscene materials,[5] child pornography,[6] fighting words,[7] incitement to imminent lawless activity,[8] and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud.[9] Whatever the

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2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 3007, 41 L.Ed.2d 789 (1974) (footnote omitted).

3. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107-08, 94 S. Ct. 326, 328, 38 L.Ed.2d 303 (1973); *Gooding v. Wilson*, 405 U.S. 518, 521-22, 92 S. Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 1829-30, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237, 83 S. Ct. 680, 684, 9 L.Ed.2d 697 (1963).

4. *New York Times v. Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 724, 11 L.Ed.2d 686 (1964).

5. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957).

6. *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed. 2d 1113 (1982).

7. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942).

8. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

9. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); *Beau-*

problems created in attempting to categorize speech in such fashion,[10] the Hustler article fits none of them.

[1, 2] Even types of speech protected generally by the first amendment may be subject to government regulation. Freedom of speech is not an absolute.[11] If the state interest is compelling and the means of regulation narrowly tailored to accomplish a proper state purpose, regulation of expression is not forbidden by the first amendment. The extent of the danger created by a publication therefore is not immaterial in determining the state's power to penalize that publication for harm that ensues, but first amendment protection is not eliminated simply because publication of an idea creates a potential hazard. Whether the Hustler article, therefore, placed a dangerous idea into Troy's head is but one factor in determining whether the state may impose damages for that consequence. Against the important social goal of protecting the lives of adolescents like Troy, the Constitution requires us to balance more than Hustler's right to publish the particular article, subject to the possibility of civil liability should harm ensue, but also the danger that unclear or diminished standards of first amendment protection may both inhibit the expression of protected ideas by other speakers and constrict the right of the public to receive those ideas.[12]

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harnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L.Ed. 919 (1952); *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 (1939). *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 n. 22, 104 S. Ct. 1949, 1961 n. 22, 80 L.Ed.2d 502 (1984).

10. *See* Gunther, Constitutional Law 1046 (11th ed. 1985).

11. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S. Ct. 997, 1005, 6 L.Ed.2d 105 (1961), *reh. denied*, 368 U.S. 869, 82 S. Ct. 21, 7 L.Ed.2d 69 (1961).

12. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 93 S. Ct. 2080, 36 L.Ed.2d 772 (1973).

While the plaintiffs alleged several different bases of liability in their original amended complaint, the issue tried was the imposition of liability on the basis of incitement, and that is the sole basis for the verdict. The question before us therefore is whether, as a matter of law, the language of "Orgasm of Death" may be defined as incitement for purposes of removing that speech from the purview of first amendment protection. If not, the judgment entered on the jury verdict cannot be affirmed even if it is conceivable that, had the case been tried on some other ground, the jury might have reached the same verdict.[13]

III.

Appellate review of jury findings in cases implicating first amendment rights must remain faithful both to the clearly erroneous standard set forth in Rule 52(a)[14] and the constitutional obligation of appellate courts "to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' "[15]

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13. *See Dees v. W.M. Webb, Inc.*, 590 F.2d 144, 146 (5th Cir. 1979); *Short v. United Mine Workers of America 1950 Pension Trust*, 728 F.2d 528, 532 n. 6 (D.C. Cir. 1984) (citing *Kassman v. American University*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam)); *Chesapeake & Ohio Railway Co. v. Illinois Central Gulf Railroad Co.*, 564 F.2d 222, 226 (7th Cir. 1977), *cert. denied*, 435 U.S. 919, 98 S. Ct. 1515, 55 L.Ed.2d 535 (1978); *Santa Clara Valley Distributing v. Pabst Brewing Co.*, 556 F.2d 942, 946 (9th Cir. 1977).

14. *See, e.g., Mack v. Newton*, 737 F.2d 1343, 1350 (5th Cir. 1984); *Gross v. Black and Decker (U.S.), Inc.*, 695 F.2d 858 (5th Cir. 1983).

15. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 728-29, 11 L.Ed.2d 686 (1964)).

Although we must accept the jury's fact findings if they are fairly supported by the record, that requirement "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."[16]

The text of the Hustler article provides the best basis for deciding whether the article may be held to have incited Troy's behavior. The jury was also entitled to consider evidence concerning whether Troy read the article immediately prior to attempting the autoerotic asphyxiation procedure, the psychiatric testimony about the likely effect such an article would have on normal adolescent readers, and the evidence about the probable state of his mind at the time he entered upon the experiment that resulted in his death. Although the jury was not asked to answer special interrogatories establishing what evidence they credited or discredited, it is apparent from the verdict that the jurors believed the testimony leading to the conclusion that Troy had read the article immediately before he entered in the acts that proved fatal and that his reaction to the article was not the result of any clinical psychological abnormality. Because these conclusions are adequately supported by evidence in the record, we accept them as true.

[3] We are not free, however, as the Supreme Court's recent decision in *Bose Corporation v. Consumer's Union* holds, to accept the jury's mixed finding of fact and law that the article culpably incited Troy's behavior without conducting "an independent review of the record both

16. *Id.*, 104 S. Ct. at 1960 (citations omitted).

to be sure the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."[17]

[4] Although we are doubtful that a magazine article that is no more direct than "Orgasm of Death" can ever constitute an incitement in the sense in which the Supreme Court—in cases we discuss below—has employed that term to identify unprotected speech the states may punish without violating the first amendment, we first analyze the evidence on the theory that it might satisfy doctrinal tests relating to incitement, for that was the theory under which the case was tried and submitted. Substituting our judgment for the jury's, as we must, we hold that liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech.

The word incitement, like many of the words in our complex language, can carry different meanings. It is properly used to refer to encouragement of conduct that might harm the public such as the violation of law or the use of force. But when the word is used in that context, the state may not punish such an inducement unless the speech involved is, as the Supreme Court held in *Brandenburg v. Ohio*,[18] "directed to inciting or producing *imminent* lawless action and . . . *likely* to incite or produce such action."[19]

17. 104 S. Ct. at 1962.

18. 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

19. *Id.*, 395 U.S. at 447, 89 S. Ct. at 1829 (emphasis added).

Brandenburg, a Ku Klux Klan leader garbed in Klan regalia, had delivered a speech threatening that, "if our President, our Congress, our Supreme Court, continues to suppress the white, caucasion race, it is possible that there might have to be some revengence (sic) taken." He challenged his conviction under an Ohio statute that punished "advocacy of the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[20] The Supreme Court reversed his conviction because neither the statute nor the state court's jury instruction distinguished between advocacy and incitement to imminent lawless action, and only the latter might constitutionally be forbidden.

Hustler argues that *Brandenburg* provides the controlling principle, and the plaintiffs assume that it may. If that were so, it would be necessary for the plaintiffs to have proved that:

1. Autoerotic asphyxiation is a lawless act.

2. Hustler advocated this act.

3. Hustler's publication went even beyond "mere advocacy" and amounted to incitement.

4. The incitement was directed to imminent action.

The *Brandenburg* focus is repeated in subsequent Supreme Court decisions. Thus, in *Hess v. Indiana*,[21] the Court held provocative remarks by a demonstrator to the police could not be punished on the basis that they had a tendency to lead to violence because there was

20. Ohio Rev. Code Ann. § 2923.13 (repealed 1971).

21. 414 U.S. 105, 94 S. Ct. 326, 38 L.Ed.2d 303 (1973).

no evidence that, or rational inference from, the import of the language that "[the] words [used] were intended to produce, and likely to produce, *imminent* disorder."[22]

The crucial element to lowering the first amendment shield is the imminence of the threatened evil. In *Hess,* the Court was faced with the question of whether an antiwar demonstrator could be punished under Indiana's disorderly conduct statute for loudly shouting, "We'll take the fucking street later," as police attempted to move the crowd of demonstrators off the street so that vehicles could pass. The Court noted that, viewed most favorably to the speaker, "the statement could be taken as counsel for moderation" and, at worst, as "advocacy of illegal action at some indefinite future time."[23] The Court reasoned that, "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished . . .on the ground that they had 'a tendency to lead to violence.' "[24]

We need not decide whether Texas law made autoerotic asphyxiation illegal or whether *Brandenburg* is restricted to the advocacy of criminal conduct. Even if the article paints in glowing terms the pleasures supposedly achieved

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22. *Id.,* 414 U.S. at 109, 94 S. Ct. at 329 (emphasis in original). *See also Watts v. United States,* 394 U.S. 705, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam).

23. 414 U.S. at 108, 94 S. Ct. at 328.

24. *Id.,* 414 U.S. at 108-09, 94 S. Ct. at 329 (citations omitted; emphasis in original).

by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.

Herceg and Andy V. complain that the article provides unnecessary detail about how autoerotic asphyxiation is accomplished. The detail is adapted from an article published by a psychiatrist in the *Journal of Child Psychiatry*. Although it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists, the detail in "Orgasm of Death" is not enough to permit breach of the first amendment. The manner of engaging in autoerotic asphyxiation apparently is not complicated. To understand what the term means is to know roughly how to accomplish it. Furthermore, the article is laden with detail about all facets of the practice, including the physiology of how it produces a threat to life and the seriousness of the danger of harm.

Under *Brandenburg,* therefore, the article was entitled to first amendment protection. But the parties' and, apparently, the district court's effort to apply the *Brandenburg* analysis to the type of "incitement" with which Hustler was charged appears inappropriate. Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior. As John Stuart Mill stated in his dissertation, *On Liberty,* "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an exicted mob assembled before the

house of a corn-dealer."[25] In *Noto v. United States,*[26] the Supreme Court expressed similar views about incitement: "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action."[27] Whether written material might ever be found to create culpable incitement unprotected by the first amendment is, however, a question that we do not now reach.

IV.

[5] Herceg and Andy V. contend that, while the first amendment might prevent the state from punishing publication of such articles as criminal, it does not foreclose imposing civil liability for damages that result from publication. In *New York Times v. Sullivan,* the Supreme Court held, "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," because the fear of civil liberty might be "markedly more inhibiting than the fear of prosecution under a criminal statute."[28] The same rationale forbids the state to impose damages for publication of "Orgasm of Death" if it could not constitutionally make the publication of that article a crime.

One state Supreme Court decision, however, may be read to imply that the state may impose civil liability in

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25. 367 U.S. 290, 81 S. Ct. 1517, 6 L.Ed.2d 836 (1961).

26. *Id.,* 367 U.S. at 297-98, 81 S. Ct. at 1520-21.

27. *See also Brandenburg,* 395 U.S. at 448, 89 S. Ct. at 1830; *Herndon v. Lowry,* 301 U.S. 242, 259-61, 57 S. Ct. 732, 739-40, 81 L.Ed. 1066 (1937); *Bond v. Floyd,* 385 U.S. 116, 134, 87 S. Ct. 339, 348, 17 L.Ed.2d 235 (1966).

28. 376 U.S. 254, 277, 84 S. Ct. 710, 724, 11 L.Ed.2d 686 (1964).

such a situation. In *Weirum v. RKO General, Inc.*,[29] the Supreme Court of California held that a radio station catering primarily to teenagers could be held liable for wrongful death damages arising from an accident caused when two youths who listened to a promotional broadcast engaged in a street race in order to be the first to reach the site at which the station had announced prize money would be given away. Most of the opinion dealt with whether the radio station owed a duty of care to the killed non-listener, and the first amendment defense was summarily rejected because "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[30]

As the California court itself noted, "virtually every act involves some conceivable danger."[31] The analysis employed by the California Supreme Court, however, provides no guidance for distinguishing between protected speech containing—or implying—dangerous ideas and speech so clearly and immediately dangerous and "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[32] Because the speech challenged was merely a promotional device to encourage listeners to continue listening to the radio station, it may have been entitled only to limited first amendment protection.[33] The broadcast announcements included

29. 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).

30. 123 Cal. Rptr. at 472, 539 P.2d at 40.

31. *Id.*

32. *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. at 769.

33. *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (over-

light-hearted warnings that listeners should "get your kids out of the street"[34] because of the reckless driving that the announcement might incite, and no warning of any kind was given to urge listeners who sought to win the prizes to use discretion in driving. In contrast, the Hustler article, while published in a magazine published for profit, was not an effort to achieve a commercial result and, at least in the explicit meaning of the words employed, attempts to dissuade its readers from conducting the dangerous activity it describes.

V.

[6] In the alternative, Herceg and Andy suggest that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm. Although political speech is at "the core of the First Amendment,"[35] the Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required.[36] Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthi-

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ruling the holding in *Valentine v. Chrestensen,* 316 U.S. 52, 62 S. Ct. 920, 86 L.Ed. 1262 (1942), that commercial speech enjoys no first amendment protection).

34. *Weirum,* 123 Cal. Rptr. at 470, 539 P.2d at 38.

35. *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 926-27, 102 S. Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982).

36. *But see Virginia State Board of Pharmacy, supra; Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 103 S. Ct. 2875, 77 L.Ed. 2d 469 (1983); *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *In re Primus,* 436 U.S. 412, 98 S. Ct. 1893, 56 L.Ed.2d 417 (1978).

ness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage—or of hang-gliding—might lead to liability just as easily. As is made clear in the Supreme Court's decision in *Hess*, the "tendency to lead to violence" is not enough.[37] Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine.[38]

VI.

Finally, even if this court were to determine that the plaintiffs may establish a cause of action under a theory of negligence, that theory could not form the basis of affirming the decision below. Plaintiffs correctly argue that an appellee, without cross-appealing, may defend the judgment on any basis having support in the record.[39] This case, however, was not tried on a negligence theory. There are, therefore, no jury findings on the issue of negligence, and this court may not infer what those findings would have been had the issue been presented. The trial was conducted on an incitement theory after the

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37. 414 U.S. at 109, 94 S. Ct. at 329.

38. *Accord, Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981).

39. *French v. Estelle*, 692 F.2d 1021, 1024 n. 5 (5th Cir. 1982), *cert. denied*, 461 U.S. 937, 103 S. Ct. 2108, 77 L.Ed.2d 313 (1983); *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106 (5th Cir. 1981); *Lucas v. American Manufacturing Co.*, 630 F.2d 291, 294 (5th Cir. 1980).

plaintiffs' various other claims were dismissed. The defense prepared its defense accordingly. Had a negligence claim remained, Hustler may have settled out of court or pursued alternative defense strategies. To allow Hustler's victories at the summary judgment phase of trial to become a trap precluding it from preparing a negligence defense would be a miscarriage of justice.[40]

VII.

Hustler's final challenge to the judgment below is to the award granted Andy V. as compensation for suffering he endured as a bystander to the tragedy. Because we have held that no liability can attach to Hustler's publication of "Orgasm of Death" under incitement theory, we need not decide whether Andy V. would have been entitled to recover damages under Texas tort law.

For the reasons stated above, the judgment of the district court is REVERSED.

EDITH H. JONES, Circuit Judge, Concurring and Dissenting:

I concur in the result in this case only because I am persuaded that plaintiffs had an obligation to cross-appeal the court's dismissal of their claims based on negligence, attractive nuisance, and strict liability or dangerous instrumentality. The majority correctly reason that Hustler should have had an opportunity to prepare a defense specifically tailored against any of these theories. Although I believe a tort claim is here defensible, the

40. *See, e.g., Gilbert v. Medical Economics Co.*, 665 F.2d 305, 310 (10th Cir. 1981); *System Operations v. Scientific Games Development Corp.*, 555 F.2d 1131, 1144-45 (3d Cir. 1977).

undeniable novelty of plaintiff's "incitement" theory does not permit us fairly to support the judgment below.

What disturbs me to the point of despair is the majority's broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes. Consonant with the first amendment, the state can protect its citizens against the moral evil of obscenity,[1] the threat of civil disorder or injury posed by lawless mobs[2] and fighting words,[3] and the damage to reputation from libel or defamation,[4] to say nothing of the myriad dangers lurking in "commercial speech."[5] Why cannot the state then fashion a remedy to protect its children's lives when they are endangered by suicidal pornography? To deny this possibility, I believe, is to degrade the free market of ideas to a level with the black market for heroin. Despite the

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1. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973).

2. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

3. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942).

4. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964).

5. *See, e.g., Posadas De Puerto Rico Association v. Tourism Company of Pureto Rico*, _____U.S._____, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986); *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed. 2d 341 (1980); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S. Ct. 1912, 56 L.Ed.2d 444 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976).

grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of "dangerous" ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.

In less emotional terms, I believe the majority has critically erred in its analysis of this case under existing first amendment law. The majority decide at the outset that Hustler's "Orgasm of Death" does not embody child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud, or obscenity,[6] all of which categories of speech are entirely unprotected by the first amendment. Nor do they find in the article "an effort to achieve a commercial result," which would afford it modified first amendment protection. Comforted by the inapplicability of these labels, they then accord this article full first amendment protection, holding that in the balance struck between society's interest in Troy's life and the chilling effect on the "right of the public to receive . . . ideas," Troy loses. Any effort to find a happier medium, they conclude, would not only be hopelessly complicated but would raise substantial concerns that the worthiness of speech might be judged by "majoritarian notions of political and social propriety and morality." I agree that "Orgasm of Death" does not conveniently match the current categories of speech defined for first amendment purposes. Limiting its constitutional protection does not, however, disserve any of these categories and is more appropriate to furthering the "majoritarian" notion of protecting the sanctity of human life. Finally, the "slippery slope argument that if Hustler is held liable here, *Ladies Home Journal* or the publisher of an article

6. Counsel for Hustler essentially conceded in the trial court that their magazine was obscene.

on hang-gliding will next be a casualty of philistine justice simply proves too much: *This* case is not a difficult one in which to vindicate Troy's loss of life.

I.

Proper analysis must begin with an examination of *Hustler* generally and this article in particular. *Hustler* is not a bona fide competitor in the "marketplace of ideas." It is largely pornographic, whether or not technically obscene. One need not be male to recognize that the principal function of this magazine is to create sexual arousal. Consumers of this material so partake for its known physical effects much as they would use tobacco, alcohol or drugs for their effects. By definition, pornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas.[7]

Not only is Hustler's appeal noncognitive, but the magazine derives its profit from that fact. If Hustler stopped being pornographic, its readership would vanish.

According to the trial court record, poronography appeals to pubescent males. Moreover, although sold in the "adults only" section of newsstands, a significant portion of its readers are adolescent. Hustler knows this. Such readers are particularly vulnerable to thrillseeking, recklessness, and mimickry. Hustler should know this. Hustler should understand that to such a mentality the warnings "no" or "caution" may be treated as invitations rather than taboos.

"Orgasm of Death" provides a detailed description how to accomplish autoerotic asphyxiation. The article appears

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7. *See* Sunstein, "Pornography and the First Amendment," 1986 Duke L.J. 589, 606-07 (1986).

in the "Sexplay" section of the magazine which, among other things, purports to advise its readers on "how to make you a much better lover."[8] The warnings and cautionary comments in the article could be seen by a jury to conflict with both the explicit and subliminal message of Hustler, which is to tear down custom, explode myths and banish taboos about sexual matters. The article trades on the symbiotic connection between sex and violence.[9] In sum, as Hustler knew, the article is dangerously explicit, lethal, and likely to be distributed to those members of society who are most vulnerable to its message. "Orgasm of Death," in the circumstances of its publication and dissemination, is not unlike a dangerous nuisance or a stick of dynamite in the hands of a child. Hustler's publication of this particular article bears the seeds of tort liability although, as I shall explain, the theory on which the case was tried is incorrect.

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8. The introduction to the Sexplay section states: "Many sexual pleasures have remained hidden for too long. . . . In keeping with HUSTLER's belief that the repression of natural and healthy urges is physically and emotionally damaging, we present this series of informative articles to increase your sexual knowledge, lessen your inhibitions and—ultimately to make you a much better lover."

9. The Attorney General's Commission on Pornography concluded recently that the assumption that pornography has "no negative effects" is no longer tenable. *Attorney General's Commission on Pornography: Final Report*, Vol. I at 1031 (July 1986) (hereinafter cited as the *Commission Report*). The Commission concluded that there is a direct causal relationship between exposure to sexually violent materials and anti-social sexual violence and, with some segments of the population, with unlawful acts of violence. *Id.* at 326. The Commission also concluded that substantial exposure to degrading but "non-violent" sexual material, bears "some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed." *Id.* at 334. *See also* F. Schauer, *The Law of Obscenity* 62 (1976) (concluding that a significant proportion of research "indicates some relationship between pornography and antisocial conduct for those who, on account of other factors, would be so disposed in any account").

II.

First amendment analysis is an exercise in line-drawing between the legitimate interests of society to regulate itself and the paramount necessity of encouraging the robust and uninhibited flow of debate which is the lifeblood of government by the people. That some of the lines are blurred or irregular does not, however, prove the majority's proposition that it would be hopelessly complicated to delineate between protected and unprotected speech in this case. Such a formulation in fact begs the critical question in two ways. First, a hierarchy of first amendment speech classifications has in fact developed largely in the last few years,[10] and there is no reason to assume the hierarchy is ineluctable. Second, the essence of the judicial function is to judge. If it is impossible to judge, there is no reason for judges to pretend to perform their role, and it is a nonsequitur for them to conclude that society's or a state's judgment is "wrong." Hence, in novel cases like this one, the reasons for protecting speech under the first amendment must be closely examined to properly evaluate Hustler's claim to unlimited constitutional protection.

The Supreme Court recently engaged in the balancing appropriate to a novel first amendment case in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S. Ct. 2939, 86 L.Ed.2d 593 (1985).[11] The Court concluded that the victim of a negligently erroneous

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10. *See generally* G. Gunther, *Cases & Materials on Constitutional Law*, chs. 12, 13 (10th ed. 1980).

11. The holding in *Dun & Bradstreet* specifically states that the credit reports there involved did not constitute "commercial speech" as that term is understood for first amendment purposes. 472 U.S. at 762 n. 8, 105 S. Ct. at 2947 n. 8.

credit report might recover presumed and punitive damages from the publisher, in the absence of actual damages. In so doing, it evaluated the interest sought to be protected by the state against the level of first amendment interest embodied in the communication at issue.

The state's "strong and legitimate" interest in protecting one's reputation was at issue in *Gertz v. Robert Welch, Inc.*: "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, *like the protection of life itself,* is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' " 418 U.S. at 341, 94 S. Ct. at 3008 (quoting *Rosenblatt v. Baer,* 383 U.S. 75, 92, 86 S. Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring)) (emphasis added). *See also Dun & Bradstreet,* 472 U.S. at 757-58, 105 S. Ct. at 2945 (also quoting Justice Stewart's *Rosenblatt* statement). The interest in protecting life is recognized specifically for first amendment purposes and, analytically, can be no less important than the interest in reputation. The state's interest in this case is to protect the lives of adolescents who might be encouraged by pornographic publications and specifically instructed how to attempt life-threatening activities. In *NAACP v. Claiborne Hardware Company,* 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982), the Supreme Court assumed that if violence had broken out as a result of Charles Evers' incendiary speech, both the mob and the speaker could have been subjected to damage claims by the victims. For similar reasons, "fighting words" have long been outside the sphere of first amendment protec-

tion. *See Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). The Supreme Court has also dealt favorably with state regulations designed to protect minors from performing sexual acts by prohibiting distribution of films containing such acts. *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982). There the Court found it "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling'." 458 U.S. at 756-57, 102 S. Ct. at 3354, (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607, 102 S. Ct. 2613, 2620, 73 L.Ed.2d 248 (1982)). The Court has even gone so far as to uphold an FCC regulation banning "indecent" speech from the airwaves at the times when children would be in the audience. *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). States already regulate the distribution of pornography to minors, *see* Schauer, *supra* n. 9, at 196-97, and a remedy for the collateral consequences of unauthorized distribution, by way of a civil action for damages, would only serve to reinforce that regulation.

Permitting recovery of damages in defamation cases offers an analogous framework. Balanced against the state interest, the Court held in *Dun & Bradstreet* that the first amendment interest at stake was less important than the one weighed in *Gertz,* 472 U.S. at 758, 105 S. Ct. at 2945. While *Gertz* involved a libelous publication on a matter of public concern, the false information in *Dun & Bradstreet* was contained in a credit report distributed to merchants. The Court employed the test of content, form and context, best articulated in *Connick v. Myers,* 461 U.S. 138, 148-49, 103 S. Ct. 1684, 1690,

75 L.Ed.2d 708 (1983), to analyze whether the credit report was a matter of "public concern." Speech on matters of "private concern," the Court found, while not wholly unprotected, is not as substantial relative to important state interests. Thus, the credit report was prepared solely for the individual interest of the speaker and a specific business, it was false and clearly damaging, and, like advertising, it represents a form of speech unlikely to be deterred by incidental state regulation: The credit report involved a matter of "private concern."

Measured by this standard, both *Hustler* in general and "Orgasm of Death" in particular deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation.[12] Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. No sensitive first amendment genius is required to see that, as the Court concluded in *Dun & Bradstreet,* "[t]here is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' " 472 U.S. at 762, 105 S. Ct. at 2947, (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L.Ed.2d 686 (1967)).

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12. In *FCC v. Pacifica Foundation,* the Court's opinion states that patently offensive references to excretory and sexual organs and activities, while to some extent protected, "surely lie at the periphery of First Amendment concern." 438 U.S. at 743, 98 S. Ct. at 3037.

To place *Hustler* effectively on a par with *Dun & Bradstreet's* "private speech" or with commercial speech,[13] for purposes of permitting tort lawsuits against it hardly portends the end of participatory democracy, as some might contend. First, any given issue of Hustler may be found legally obscene and therefore entitled to no first amendment protection. Second, tort liability would result after-the-fact, not as a prior restraint, and would be based on harm directly caused by the publication in issue. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. at 917-919, 102 S. Ct. at 3427-28. Third, to the extent any chilling effect existed from the exposure to tort liability, this would, in my view, protect society from loss of life and limb, a legitimate, indeed compelling, state interest. Fourth, obscenity has been widely regulated by prior restraints for over a century. Before *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957), there was no *Hustler* magazine and it would probably have been banned. Despite such regulation, it does not appear that the pre-*Roth* era was a political dark age. Conversely, increasing leniency on pornography in the past three decades has allowed pornography to flourish, but it does not seem to have corresponded with an increased quality of debate on "public" issues. These observations imply that pornography bears little connection to the core values of the first amendment and that political democracy has endured previously in the face of "majoritarian notions of social propriety."

Rendering accountable the more vicious excesses of

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13. *Compare Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980).

pornography[14] by allowing damage recovery for tort victims imposes on its purveyors a responsibility which is insurable, much like a manufacturer's responsibility to warn against careless use of its products. A tort remedy which compensates death or abuse of youthful victims clearly caused by a specific pornographic publication would be unlikely to "chill" the pornography industry any more than unfavorable zoning ordinances[15] or the threat of obscenity prosecution[16] has done. The reasonableness of allowing a tort remedy in cases like this is reinforced by the fact that only one lawsuit was filed in regard to "Orgasm of Death." The analogy with regulations on commercial speech is not inappropriate: pornography should assume a lower value on the scale of constitutional protection; and the state regulation by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not broader than necessary to accomplish its purpose. *See Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351.

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14. See, for example, the Meese Commission Report, whose research samples included 2,325 magazine titles, 725 book titles, and 2,370 film titles. *Commission Report, supra* n. 9, Vol. II at 1504. While more graphic titles are cited, the following is a list of the more shocking pornograpic publication titles: *Animal Action, Incest Mommy,, Island of Incest, I Want All Night Abuse, Knocked up Black Mama, Nazi Sex Slave, Nympho Mother's Incest Obsession, Pregnant Dildo Bondage, Pregnant Lesbians, Slave Exchange, Teenage Tramp, Transvestites Getting Together, Teen Rape Orgy, The Nuns Animal Fun, Unwilling Sex Slave.*

15. *City of Renton v. Playtime Theatres, Inc.*, ____U.S.____, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986).

16. The production, distribution, and retail sale of pornographic materials has become a multi-billion dollar industry in the United States. *See Commission Report, supra* n. 9, Vol. II, ch. 8. Current laws and their enforcement apparently have little deterrent effect on this blossoming industry. *Id.*, Vol. I at 366-72.

The foregoing analysis immediately differentiates this case from *Brandenburg v. Ohio,*[17] which addressed prior restraints on public advocacy of controversial political ideas. Placing *Hustler* on the same analytical plane with *Brandenburg* represents an unwarranted extension of that holding, which, unlike *Dun & Bradstreet* and the commercial speech cases, rests in the core values protected by the first amendment. Even *Brandenburg,* however, recognized that the state's regulatory interest legitimately extends to protecting the lives of its citizens from violence induced by speech. Moreover, *Brandenburg* is intertwined with the context of the speech as well as its content—advocacy of inciteful ideas would thus be differently regarded in a collection of speeches by Tom Paine than it is among a crowd of armed vigilantes who proceed to riot. The *Brandenburg* test, implicitly rejected by the majority, is simply inappropriate to define the limits of constitutional protection afforded in this case.[18] Viewed in the overall context of first amendment jurisprudence, moreover, *Brandenburg* does not exclude the possibility of state regulation.

III.

Texas courts have never been called upon to assess a claim like this one. Since there is no cross-appeal, we should not speculate on the precise nature of the theory

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17. 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969).

18. *Compare* Comment, "Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations," 93 Yale L.J. 744 (1984) (advocating liability on a negligence standard defined by reference to *Brandenburg*); with Comment, "Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis," 52 S. Cal. L. Rev. 529 (1979) (similar standard to Yale Law Journal).

of liability a Texas court might accept, although negligence and attractive nuisance seem theoretically appropriate.[19] Texas law supplies no reason to conclude, as the district court did, that *Brandenburg v. Ohio,* representing a federal constitutional limitation on a state's restraints on speech, could be turned into an affirmative theory of tort law. I believe this use of *Brandenburg* is wrong, insofar as it suggests that federal constitutional law rather than state law governs the first issue in this case, which is the nature of the tort committed by Hustler.

Eliminating the *Brandenburg* incitement theory as a basis for recovery would have been sufficient to reverse the jury award here. The majority go much further, however, and afford *Hustler* virtually complete protection from tort liability under the first amendment. I vigorously oppose their unnecessary elaboration on first amendment law, which, I believe, will undercut the ability of the states to protect their youth against a reckless and sometimes dangerous business which masquerades as a beneficiary of the first amendment.

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19. In *Wierum v. RKO,* 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975), the Supreme Court of California held a radio station liable for broadcasting a promotional event which caused the teenage listeners to participate in a high-speed chase in the Los Angeles freeways killing a motorist. There was a direct connection between the station's broadcast and the fatal accident. In *Hyde v. Missouri,* 637 S.W.2d 251 (Mo. Ct. App. 1982) the court held a newspaper and other defendants liable for publishing the name of a victim of a sexual assault while her attacker was still at large. The causal connection between the published information and the attacker's continued threats to the victim was again straightforward. Other courts have rejected damage claims based on tenuous facts. *Zamora v. Columbia Broadcasting System,* 480 F.Supp. 199 (S.D. Fla. 1979), or first amendment analysis with which I differ. *DeFilippo v. National Broadcasting Co.,* 446 A.2d 1036 (R.I. 1982); *Olivia N. v. National Broadcasting Co.,* 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

APPENDIX B-1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-82-198

DIANE HERCEG and ANDY VINES,
Plaintiffs,

v.

HUSTLER MAGAZINE, INC.,
Defendant.

(Filed March 29, 1985)

MEMORANDUM AND ORDER

Presently pending before the Court is Defendant's Motion for Summary Judgment. Rule 56, FED. R. CIV. P. The Court, having considered carefully the motion, together with the briefs filed by the parties and the relevant case law, concludes that the motion should be granted in part.

This action was originally filed on January 22, 1982. alleging negligent publication and strict liability as theories of recovery. On June 6, 1983, the Court (per Judge McDonald) dismissed Plaintiffs' causes of action for failure to state a claim upon which relief could be granted. Rule 12(b)(6), FED. R. CIV. P. *See Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D. Tex. 1983). In that memorandum opinion and order, Judge McDonald granted "leave to amend and to add an allegation of

incitement." *Id.* at 805. Plaintiffs filed their Amended Original Complaint on June 15, 1983. On June 29, 1983, Defendant filed its Motion to Dismiss or, In the Alternative, to Strike Claims. That motion was denied on May 1, 1984. *Herceg v. Hustler Magazine, Inc.*, 583 F.Supp. 1566 (S.D. Tex. 1984). The instant motion was filed on September 10, 1984.

NEGLIGENCE & STRICT LIABILITY

Initially, the Court will turn its attention to Plaintiffs' negligence and strict liability theories. While Defendant has characterized this motion as one for summary judgment, the Court finds it analogous to one for dismissal for failure to state a claim. Inasmuch as the Court's decision in regard to these theories is reached without recourse to matters outside the pleadings, the motion will be treated as one to dismiss. *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir.), *cert. denied*, 342 U.S. 818, *reh. denied*, 342 U.S. 879 (1951), *reh. denied*, 343 U.S. 989 (1952).

As a threshold matter, the Court notes that the negligence and strict liability theories presented in the Amended Complaint are identical to those issues as presented in the Original Complaint. As noted previously, Judge McDonald dismissed both theories for failure to state a claim. 565 F.Supp. 802. Plaintiffs have made no attempt to amend these issues to overcome their defects. Accordingly, dismissal would be warranted without further consideration. However, in an abundance of caution, the Court will address briefly the merits of each claim.

The Court has been unable to discover any case which has held that a published article may constitute an

unreasonably dangerous product as that term is defined in § 402A of the Second Restatement of Torts. *See* Comment i to § 402A. Further, the Court is completely unaware of any action in which a court has held the written word may constitute an attractive nuisance. On the contrary, in those cases where the issue has been addressed, either directly or in analogous actions, courts have consistently rejected the concept of strict liability in regard to the content of published material. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Two Rivers Co. v. Curtis Breeding Serv.*, 624 F.2d 1242 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. Civ. App.—Houston, 14th Dist. 1974). Treatises on the subject are in accord. *See e.g.* Prosser, *Law of Torts* § 78 at 510-516 (4th Ed. 1971). In light of the foregoing, the Court concludes that imposition of liability without fault would be in direct contravention of the constitutional limitation announced in *Gertz*. *See also Time v. Firestone*, 424 U.S. 448, 459 (1976).

The concept of negligent publication is one which arose in defamation cases, clearly not at issue here. Beyond defamation, no court has ever imposed liability on a private publisher under the theory of negligence.[1] Indeed, the Court is unable to conceive of a set of facts which would give rise to a duty on the part of the publisher. But of primary concern to the Court is the extent to which civil liability under traditional negligence

1. The only instances in which the courts have upheld a cause of action in negligent publication lie where the United States was defendant. These cases have repeatedly stressed the "public function" of the publications. No one suggests here that Hustler has been appointed to fulfill any public function. Cf. *Debardeleben Marine Corp. v. United States*, 451 F.2d 140 (1971).

theories would contravene the first amendment protection afforded free speech. The commercial nature of the speech at issue here does not relax the Court's vigilance. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 n.23 (1978). Neither does the issue of civil versus criminal liability. As the Supreme Court noted more than twenty years ago, "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of [criminal] prosecution. . . ." *New York Times Co. v. Sullivan,* 376 U.S. 254, 277 (1964). The first amendment protections remain even where, as Plaintiffs have urged, the material may be accessible to minors. *Cf. F.C.C. v. Pacifica Foundation,* 438 U.S. 726 (1978); *Butler v. Michigan,* 352 U.S. 380 (1957).

In a recent case, remarkedly similar to facts here, a 13-year old child accidentally hung himself while attempting to duplicate a stunt shown on N.B.C.'s "Tonight Show." The Supreme Court of Rhode Island rejected liability in negligence, holding that to allow recovery would "invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit." *DeFilippo v. National Broadcasting Co., Inc.,* 446 A.2d 1036, 1041 (1982). The result in this case is in accord with those from other jurisdictions which have addressed the issue. *See e.g. Zamora v. Columbia Broadcasting System,* 480 F. Supp. 199 (S.D. Fla. 1979); *Bill v. Sup. Ct. for City and County of San Francisco,* 187 Cal.Rptr. 625 (1982), *reh. denied* (1983); *Olivia v. National Broadcasting Co., Inc.,* 178 Cal.Rptr. 888 (1981), *cert. denied,* 458 U.S. 1108, *reh. denied,* 458 U.S. 1132 (1982). The Court concludes that there is therefore no basis in law or at

equity in support of a negligence cause of action against Defendant herein.

INCITEMENT

> [T]he summary judgment standard . . . is a strict one, allowing entry of judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c), *see, e.g. Transourse International v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Moreover, in considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982). However, once the moving party makes an initial showing that no genuine issue of material fact exists, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e).

Shelton v. City of College Station, Slip Op. 83-2765 at 2990-91 (5th Cir. March 11, 1985), *quoting Hood v. Tenneco Texas Life Insurance Co.*, 739 F.2d 1012, 1014 (5th Cir. 1984) (emphasis added).

Resolution of this motion has been particularly troubling for the Court. Plaintiffs' Amended Original Complaint seems to suggest that Defendant negligently published the article in question, and that this negligent publication in turn incited decedent's actions. Standing alone, these averments clearly do not satisfy the test for incitment as announced in *Brandenburg v. Ohio*,

395 U.S. 444 (1969), and would ordinarily entitle Defendant to judgment as a matter of law. *Cf. Olivia,* 178 Cal.Rptr. 888. However, in order for Defendant to prevail on its motion, it must prove that no issue of material fact exists as to the three factual issues comprising incitement. *Herceg,* 583 F.Supp. 1566, 1567 n. 1. After an exhaustive review of the pleadings and attachments as a whole, and mindful of the Fifth Circuit's stricture that the record must be viewed in a light most favorable to the nonmovant, *Dernick v. Bralorne Resources, Ltd.,* 639 F.2d 196 (5th Cir. 1981), the Court concludes that a full hearing on the issue of incitement would be in the interests of justice and judicial economy.

Accordingly, for the reasons stated above, the Court hereby ORDERS:

Defendant's Motion for Summary Judgment is GRANTED IN PART. All allegations in the Amended Original Complaint regarding liability under any theory other than incitement are DISMISSED. This case will be set for a full hearing on the incitement issue alone at the convenience of the Court and the parties.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

DONE at Houston, Texas, this 29th day of March 1985.

/s/ WOODROW SEALS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-82-198

DIANE HERCEG and ANDY VINES,
Plaintiffs,

v.

HUSTLER MAGAZINE, INC.,
Defendant.

(Filed March 29, 1985)

ORDER

Presently pending before the Court is Plaintiffs' Motion to designate Bob Rogers as an expert witness for purposes of a summary judgment hearing, and for the Court to consider certain pictures as part of Plaintiffs' briefs in regard to the Motion for Summary Judgment decided this day.

The Court, having considered the motion, hereby ORDERS:

Plaintiffs' motion to offer Bob Rogers as an expert witness for the purposes of a summary judgment hearing is GRANTED.

The photographs at issue here are not relevant to the issues of summary judgment. Plaintiffs may offer said photographs at trial, subject of course to a determination of relevancy, and a weighing of their prejudicial value. Rules 401 & 403, FED. R. EVID. Pending resolution of

those issues, the Court hereby directs the Clerk to place under seal the photographs appended to Plaintiffs' Further Response to Defendant's Motion for Summary Judgment.

The Clerk shall file this Order and provide all parties with a true copy.

Done at Houston, Texas, this 29th day of March 1985.

/s/ WOODROW SEALS
United States District Judge

APPENDIX B-2

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-82-198

DIANE HERCEG and ANDY VINES

v.

HUSTLER MAGAZINE, INC.

(Filed November 25, 1985)

MEMORANDUM AND ORDER

Presently pending before the Court is Defendant Hustler Magazine's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial. Rules 50(b) and 59, FED. R. CIV. P. The Court, having considered carefully the motion, together with the briefs submitted by the parties, the evidence adduced at trial and the relevant law, concludes that the motion must be denied.

JUDGMENT N.O.V.

The standard governing a decision to grant or deny a motion for judgment notwithstanding the verdict is that set forth in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc):

> On motions for . . . judgment notwithstanding the verdict the Court should consider all of the

> evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper . . . However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine credibility of witnesses.

411 F.2d at 374. *See also, Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1563 (5th Cir. 1984).

The arguments which counsel for Hustler advances here are those which the Court considered and rejected at the time of Defendant's motion for a directed verdict, both at the close of Plaintiffs' case in chief, and at the close of all testimony. In every instance cited by Hustler, more than a mere scintilla of evidence exists. The jury was entitled to weigh and evaluate the opposing testimony, and this Court will not now invade the traditional province of the fact finder by substituting its judgment.

NEW TRIAL

The decision to grant or deny a motion for a new trial is one committed to the sound discretion of the court. *Reeves v. General Foods Corp.,* 682 F.2d 515 (5th Cir. 1982). The standard here is lower than that applicable under a motion for Judgment n.o.v. The trial judge may set aside the verdict and grant a new trial if, in his opinion, the verdict is against the great weight of the evidence or will result in a miscarriage of justice,

even though there may be substantial evidence in support. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982). Moreover, the court is not required to view all the evidence and make all inferences in a light favorable to the non-mover, but may weigh and evaluate the evidence in much the same fashion as the jury. This Court will not order a new trial, however, merely because it may have reached a different verdict. The verdict must be against the *great* weight of the evidence. *See generally*, 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2806 (1973).

Hustler's motion for a new trial attacks the sufficiency of evidence covering several issues presented at trial. The Court notes that these arguments are the same rejected at the close of testimony and outside the presence of the jury. The issues presented, and their evidentiary support, were ably contested by counsel for both sides. And while conflicting evidence was introduced covering virtually every issue, the Court is unable to conclude that the jury's verdict was against the great weight of that evidence.

Counsel for Hustler also urges that Plaintiffs' closing argument (asserting greed and avarice on the part of Hustler Magazine) were outside the record and so prejudicial and inflammatory that it could not be cured by objection and cautionary instructions. The Court disagrees. Taken as a whole, the arguments of counsel and charge to the jury were sufficient to safeguard Defendant from any possible prejudice resulting from Plaintiffs' argument.

Accordingly, for the reasons stated above, the Court hereby ORDERS:

Plaintiffs' Motion for Judgment Notwithstanding the Verdict or, in the Alternative; For a New Trial is DENIED.

The Clerk shall file this Memorandum and Order and provide all parties with a true copy.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 25th day of November 1985.

/s/ WOODROW SEALS
United States District Judge

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-113

(2)

In The
Supreme Court of the United States
October Term, 1986

DIANE HERCEG and ANDY VINES,
Petitioners,

vs.

HUSTLER MAGAZINE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit correctly applied the test of *Brandenburg v. Ohio* and *Hess v. Indiana* and correctly determined that *Hustler's* article "Orgasm of Death" did not constitute an "incitement"?

2. Whether the Court of Appeals for the Fifth Circuit correctly determined that the test for incitement set forth in *Brandenburg v. Ohio* and *Hess v. Indiana* was the proper standard for review of the trial court's judgment?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Petitioners: Diane Herceg
Andy Vines

Defendant/Respondent: Hustler Magazine, Inc.

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No. 87-113

In The

Supreme Court of the United States

October Term, 1986

DIANE HERCEG and ANDY VINES,

Petitioners,

vs.

HUSTLER MAGAZINE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

REFERENCE TO OPINIONS

The United States District Court for the Southern District of Texas issued four opinions in the course of this litigation. The opinion granting Respondent's Rule 12 Motion, but granting Petitioner leave to amend is published at 565 F.Supp. 802. The opinion denying Respondent's renewed Rule 12 Motion is published at 583 F.Supp.

1566. The opinion granting Respondent's Motion for Summary Judgment, in part and denying it in part, is unpublished and is reproduced at Appendix B-1 in the petition filed with the Court by Petitioners. The opinion denying Respondent's Motions for Judgment Notwithstanding the Verdict and for a New Trial is unpublished and is reproduced as Appendix B-2 to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated April 20, 1987, is reported at 814 F.2d 1017, and is reproduced at Appendix A in the petition filed with the Court by Petitioners.

JURISDICTION

The Judgment for the Court of Appeals for the Fifth Circuit was entered on April 20, 1987. No Motion for Rehearing was filed.

Petitioners allege that jurisdiction of this Court is based upon 28 U.S.C., Section 1254(1).

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the relevant facts.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly applied the test for incitement set forth in Brandenburg v. Ohio and Hess v. Indiana and correctly determined that the Hustler article "Orgasm of Death" did not meet the test for incitement.

A. The Court of Appeals correctly applied the test for incitement as set forth in Brandenburg v. Ohio and Hess v. Indiana.

The Court of Appeals correctly reviewed the judgment of the district court by applying the test for incitement set forth in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) and explained in *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). Petitioners tried their case on the theory that the article was unprotected speech because it fell within the "incitement" exception to First Amendment protection. Petitioners do not allege that the article is untrue, defamatory or obscene. The sole unredeeming attribute of the article, according to Petitioners, is its discussion of a dangerous sexual practice. In this context, the Court of Appeals was correct in turning to this Court's previous opinions defining incitement to determine whether Petitioners met their burden of establishing lack of First Amendment protection.[1] Its cor-

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[1]Respondent agrees with the Court of Appeals' assessment that "the district court's effort to apply the *Brandenburg* analysis to the type of 'incitement' with which *Hustler* was charged appears inappropriate." 814 F.2d at 1023. The concerns underlying the development of the "incitement" exception to First

(Continued on following page)

rect application of that approach counsels denial of the petition for certiorari.

In *Brandenburg* a Ku Klux Klan leader challenged his conviction under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" by his appearance, in Klan regalia, at an organizer's meeting and his comments at that meeting, including his statement that:

> We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.

Even though the wording of the statute under which Brandenburg was convicted essentially tracked the wording of a California statute upheld earlier in *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), this Court held the Ohio statute unconstitutional. It declared that *Whitney* had been discredited by later decisions, and that:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except

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(Continued from previous page)

Amendment protection are not present in this case. Nevertheless, Petitioners, apparently recognizing that pure speech could not constitutionally be punished, attempted to pigeonhole the article into a recognized exception to First Amendment protection. Because the judgment of the district court was based on a finding that the article constituted an "incitement," the Court of Appeals' review of the article in terms of the *Brandenburg* test was necessary and proper.

> where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

In *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed. 2d 303 (1973), the Supreme Court reversed Hess's conviction, holding that his words did not constitute an incitement. Hess was involved in an antiwar demonstration on the campus of Indiana University, and in the course of the demonstration between 100 and 150 demonstrators blocked traffic in the streets. The sheriff and his deputies began clearing the streets and it was alleged that as Hess was leaving he said, "We'll take the fucking street later," or "We'll take the fucking street again." He was arrested. 414 U.S. at 106-07.

This Court reviewed Hess's speech and found it did not meet the requirements of incitement. Witnesses reported that Hess was not exhorting the crowd to go back into the street, he was facing the crowd not the street when he spoke, he did not direct his comments to a particular person or group, and that his tone, although loud, was no louder than that of others in the area. 414 U.S. at 107. The Court held that at worst Hess's statement "amounted to nothing more than advocacy of illegal action at some indefinite future time." 414 U.S. at 108. It also noted that the evidence:

> showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State

> on the ground that they had "a 'tendency to lead to violence'."

414 U.S. at 108-109 (emphasis in original) (citations omitted).

Although certainly not binding on this Court, the fact that the Court of Appeals' opinion was consistent with that of other courts that have faced the issue shows the law is developing in an orderly and predictable fashion such that this Court need not give any direction. *See De Filippo v. NBC,* 446 A.2d 1036 (R.I. Sup.Ct. 1982) (imitation of hanging stunt leading to accidental death not actionable); *Olivia N. v. NBC,* 126 Cal.App.3d 488, 178 Cal. Rptr. 888 (1981) (imitation of television depiction of sexual assault with broomstick not actionable). For example, the Court of Appeals' approach was the same as that of the Rhode Island Supreme Court when it faced very similar issues in *DeFilippo v. NBC,* 446 A.2d 1036 (R.I. Sup. Ct. 1982).

DeFilippo arose out of the death of a thirteen-year-old boy, who had been watching an episode of "The Tonight Show" with Johnny Carson that included an interview with a professional stuntman. As part of his appearance the stuntman was to "hang" Johnny Carson. Before he did so he pointed out that this was not something that someone should try and that people had tried this and been seriously hurt. After he and Carson engaged in a comic dialogue, the stuntman "hanged" Carson, to no injury to Carson. Several hours after the broadcast the DeFilippos found their son Nicky hanging from a noose in front of the television set, which was still tuned to the NBC station upon which "The Tonight Show" appeared. Plaintiffs claimed that their son had been watching the show,

had attempted the stunt, and had accidentally hung himself.

The Rhode Island Supreme Court, after rejecting the DeFilippos' negligence claim, turned to whether the broadcast fell into an area of unprotected speech—in this instance whether is constituted incitement. In doing so, it applied the *Brandenburg* test and rejected the incitement claim. The Court of Appeals' similar use of *Brandenburg* and *Hess* bespeaks an orderly development in this area of the law.

The Court of Appeals' adaptation of the *Brandenburg-Hess* standard to this case provided a useful framework in analyzing the elements of proof for incitement in a civil action. It ruled that the plaintiff had to show:

1. Autoerotic asphyxiation is a lawless act.
2. *Hustler* advocated this act.
3. *Hustler's* publication went even beyond 'mere advocacy' and amounted to incitement.
4. The incitement was directed to imminent action.

814 F.2d at 1022. This test is a helpful and accurate one that this Court need not disturb. The Court of Appeals, applying this test, correctly found that the article did not advocate the practice or constitute an incitement to imminent lawless action.

B. The Court of Appeals correctly held that no fair reading of the article could make its content advocacy to engage in the practice of autoerotic asphyxiation.

The Court of Appeals correctly found that the article did not advocate[2] autoerotic asphyxiation. Any fair reading of the article will reveal it for what is is: an educational piece about a dangerous sexual practice. A copy of the article is attached to this brief as Appendix A.

The article appears in a regular segment of *Hustler* called SEXPLAY, which includes a paragraph introducing the series of articles[3]. The article is headed with an "Editor's Note":

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[2]Petitioners' argument that *Brandenburg* does not require advocacy to support an incitement claim is patently without merit. The First Amendment does not allow punishment of the abstract expression of ideas, even dangerous or offensive ideas. The incitement exception to First Amendment protection derives from concern about the calculated effect certain kinds of speech have on people. To constitute unprotected incitement, the words must go beyond mere expression or discussion and be of such a character and nature that they urge, encourage, exhort, or advocate. This Court's decision in *Hess* made clear that for incitement, the speaker must advocate the conduct involved. 414 U.S. at 108-109. Justice Rehnquist's dissent in *Hess* even recognized that the words at issue had to be characterized as "an exhortation" before they could be punished. *Id.* at 111. Indeed, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), one of the reasons the Court was troubled by the speech was that it could be construed as advocating violence. 458 U.S. at 926-928.

[3]The standard editorial introduction to the SEXPLAY series stated in part: "We present this series of informative articles to increase your sexual knowledge, to lessen your inhibitions and—ultimately—to make you a much better lover." This introduction plainly prefaces a series of articles designed to make

(Continued on following page)

Editor's Note: *HUSTLER* emphasizes the often-fatal dangers of the practice of "auto-erotic asphyxia," and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.

The article begins by describing the death of a teenager, "Bobby L.," by hanging while masturbating. It says that "Bobby's method of masturbation was neither healthy nor harmless." The article describes the practice of cutting off the air supply to increase sexual excitement and points out that sometimes the practitioner "never comes out of it." It then discusses the number of deaths that have occurred as a result of the practice and an article on the practice that appeared in the *Journal of Child Psychiatry*.

The article then describes the real danger of the practice as the belief that asphyxia can be controlled. It calls this belief a "critical error" and notes that the baroceptor reflex may result from too much pressure on the neck, causing the flow of blood to the brain to halt, leading to rapid unconsciousness. The unconscious practitioner then falls on the noose and hangs.

The article goes on to discuss other examples of those who engaged in this practice. It describes the lifestyle and

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(Continued from previous page)

readers better lovers, and educating readers on being better lovers is as much telling them what not to do as telling what to do. The article telling readers not to attempt autoerotic asphyxia and to watch for signs of the practice in friends or relatives so they can be helped is consistent with the introduction and with the purpose of the SEXPLAY section.

death by hanging of Vaughn Bode, a cartoonist, characterizing his efforts at pursuing "quick and dangerous highs" as a "form of spiritual Russian roulette." It then describes an unnamed 15-year-old male's habit and notes that it was discovered early enough that a psychiatrist could arrange for psychotherapy sessions to alter "his destructive behavior."

The article discusses the relationship between hanging and erotic bondage, relying upon observations by psychotherapists, sex researchers, a psychiatrist, and a study of the relationship between bondage and suicide. Then the article contrasts the awareness of the danger of death in the practice between adults and teenagers, noting that adults realize they are flirting with death but that "teenagers may think it's just a cheap high that won't harm them any more than a ride in a fast car."

The article ends as it began, with a warning:

> It's a fact: People practicing this form of sexual stimulation *do* kill themselves. Recognizing the syndrome early is one way to stop a friend or relative before he or she takes the ultimate one-way trip. But it is also important to know—beyond a doubt—that auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe.

An article that begins "DO NOT ATTEMPT this method," that describes its practitioners as mentally ill, and that says you try this form of sex play only if you want to die simply does not advocate that people engage in the practice. In fact, the only reasonable interpretation of the article is that it does the opposite of advocate—it disapproves of and opposes the practice.

Even if the numerous warnings in the article are ignored, at most the article merely describes the availability of a sexual practice.[4] In that respect it resembles the contraceptive advertisements involved in *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). When faced with the claim that the contraceptive advertisements legitimized illicit sexual behavior, the Court pointed out that the advertisements for contraceptives could not even remotely be characterized as incitement—they merely stated the availability of legal and constitutionally protected products and services. 431 U.S. at 701. Here, as in *Carey,* the Court of Appeals rightly concluded that the mere description of the practice was constitutionally protected and did not meet the requirements for incitement.

It is hard to imagine how *Hustler* could have written the article in any more effective way to educate its readers on the dangers of the practice. As the Court of Appeals recognized, if this was advocating the practice, then virtually any description of a dangerous practice accompanied by warnings not to perform the practice could be considered advocacy. The Court of Appeals correctly chose to judge *Hustler* by the words it published, not by some innuendo or strained meaning of the article 180 degrees opposite from what *Hustler* said.

The *DeFilippo* holding bears here. In *DeFilippo* the Rhode Island Supreme Court recognized that when the

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[4]Although the Court of Appeals did not consider the issue, the practice described in the article was not an illegal act, as required by *Brandenburg* and *Hess.* This is yet another reason why the article did not meet the test of incitement.

broadcast stressed the dangers of performing the stunt, the broadcast lost any incitement character it might have had. The basis for that decision necessarily must have been that the warnings made it clear that the broadcaster was not advocating emulation of the practice. *See* 446 A.2d at 1041. Similarly, when *Hustler* repeatedly warned against the practice of auto-erotic asphyxia, the Court of Appeals was correct in saying that "no fair reading of it [the article] can make its content advocacy, let alone incitement to engage in the practice." 814 F.2d at 1023.

C. The article does not advocate imminent action and could not create culpable incitement to imminent action unprotected by the First Amendment.

The Court of Appeals correctly observed that a finding of incitement was inappropriate for written material. It noted that "[t]he root of incitement theory appears to have been grounded in concern over crowd behavior." 814 F.2d at 1023. Written materials are in an entirely different context—they lack that sense of intimacy, interaction and power that can develop in a personal address to a large group of people well-recognized in our political and social history—that seriously argues that written materials could never meet the test for incitement to imminent action. *See, e.g., Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) (editorials complaining of judicial action did not pose danger of extremely serious substantive evil of improper influence of judicial action nor an extremely high imminence of such evil, requiring contempt citations for out-of-court publications to be set aside). But the Court of Appeals did not reach the question, correctly find-

ing instead that any advocacy in the article was not directed to imminent action.

First, the words in the article do not say "do it now"; they do not call for imminent action. The reasonable reading of the words in the article is "don't ever do it or you will probably die." Even plaintiffs' witnesses testified that the article contained no explicit or overt encouragement of the practice. The lesson of *Brandenburg* and particularly of *Hess* is that the words must call for action *now*. Here, as in *Hess v. Indiana*, 414 U.S. 105 (1973), "At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." 414 U.S. at 108. *See also Noto v. United States*, 367 U.S. 290, 297-298, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961) (speech merely teaching moral propriety of violence for change not punishable; substantial evidence of a present call to violence needed). Similarly, discussing the practice of auto-erotic asphyxia, even implicitly describing it as desirable, does not meet the imminence requirement for incitement.

Second, just because one person may have acted after reading the article does not justify, without more, after the fact punishment of the speaker for alleged incitement to imminent action. This is the lesson of *Cox v. Louisiana*, 379 U.S. 536, 550-51, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) and *Cohen v. California*, 403 U.S. 15, 23, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). For example, in *Cohen* the State argued that it was entitled to prosecute Cohen for wearing his jacket with "Fuck the draft" on the back into the courthouse because others might react adversely to that com-

ment and create a disturbance. This Court rejected that argument, classifying it as a "self-defeating proposition" that the State could increase its role as a censor because others might take violent offense at the remarks of a speaker who has not sought to provoke such a response. 403 U.S. at 23. The Court of Appeals properly held that the fear that some unfortunate individuals might misread an article and ignore its warnings does not justify stripping the article of constitutional protection.

Finally, Petitioners seemed to argue that the article made the practice appear attractive to teenagers and thus incited imminent action. But the Court of Appeals recognized that making a practice appear attractive is a far cry from incitement to imminent action. The New York Education Department's Motion Picture Division made claims similar to those here when it denied a license to the film "Lady Chatterley's Lover" because it presented adultery as a desirable, acceptable and proper pattern of behavior. In *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959), this Court struck down that denial, recognizing that,

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas.

360 U.S. at 688. The Court rejected the argument that the State's action was justified because the movie attractively portrayed illegal and immoral conduct. The Court said:

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the

> religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

360 U.S. at 688-89. In the same way the Court of Appeals properly rejected Petitioners' claim of incitement, as should this Court.

II. The Court of Appeals correctly determined that the trial court's judgment could not be upheld on a less stringent negligence standard.

A. The court of Appeals correctly found that Petitioners did not preserve any negligence claim.

The Court of Appeals correctly held that Petitioners did not preserve error and thus waived their argument that the Court reject the years of constitutional development of this issue since *Brandenburg* and create a new category of speech that falls outside of constitutional protection. Petitioners did not object to the submission of the charge on the incitement issue, they did not urge submission of other issues, they attempted to enlarge their rights on the appeal, and they did not give notice of appeal on this issue.[5] The failure to preserve this issue means that this ground is not a proper one upon which to grant a petition for certiorari.

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[5]Petitioners did give notice of appeal, but only on the issue of prejudgment interest. (R.A. 38)

Petitioners waived the argument advanced in their Petition for Writ of Certiorari in which they urge that the test of incitement should not apply in this case and that the defendant's conduct should be measured by a negligence standard. Petitioners did not try a negligence case in the district court. The district court granted defendant's motion to dismiss the allegations of negligent publication, and plaintiffs did not present evidence of negligence or pursue a cross-appeal. It is well-settled that an appellee may not attack a judgment with a view of enlarging his own rights. *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 (1924). It is equally well-settled that, although an appellee may, without taking a cross-appeal, urge an argument in support of the judgment that was not relied upon by the district court, the argument must be supported by the record. *See id.; Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 565 n.5 (5th Cir. 1985).

The legal and factual findings necessary to support a judgment of negligence do not appear in the record. Issues concerning the existence and nature of a duty and whether the duty was breached were not tried and were not presented to the judge or the jury for decision. Further, Petitioners neither objected to the charge nor submitted proposed negligence issues to the district court.

Finally, Petitioners seek to enlarge their rights and are not entitled to do so without pursuing a cross-appeal. They abandoned their negligent publication claim in the district court by failing to present evidence of negligence and by failing to object to the charge. Petitioners may not urge a theory of recovery on appeal when they did not try their suit on that theory nor introduce evidence in support of the theory below. *See, Green v. Edmands Co.*, 639 F.2d

286, 288 (5th Cir. 1981); *Dees v. W. M. Webb, Inc.*, 590 F.2d 144, 146 (5th Cir. 1979). This case is not an appropriate one to review these issues.

B. The Court of Appeals correctly rejected the claim that a less stringent standard for applying First Amendment protections should be used in cases involving non-political speech that has actually caused harm.

Even on the merits, Petitioners ask the Court to grant the writ so that it can undo much of the development of First Amendment protection for the freedom of speech in the last 50 years. They urge this Court to abandon its precedents controlling this area and create a new category of unprotected speech for "non-political" speech that might involve the "physical and psychological well-being of a minor" under which *Hustler* and others would be liable for negligent creation of a clear and present danger of spurring action that causes severe personal injuries or death. In essence, if any form of truthful, non-defamatory speech short of political rhetoric results in injuries to a minor, the speaker could be held liable. The Court should reject this dangerous and unnecessary invitation to start judging the relative value of speech on social issues.

Petitioners try to draw an analogy to libel cases as a ground for establishing their new category of unprotected speech, but this is unpersuasive because Petitioners have ignored the fundamental distinction between the issues involved in a libel case and those involved in this case. In libel cases, this Court has struggled with the limits of constitutional protection for *false* speech injurious to reputation in order to preserve the larger First Amendment

interest in promoting speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Here, no false speech injurious to reputation is involved. This Court's analysis of libel law and the First Amendment has focused on when speech that was once presumed unprotected should be protected. Petitioners want this Court to take protected speech and make it unprotected. Petitioners' libel analogy is thus fatally flawed.

Petitioners then argue that because the article appears in a magazine like *Hustler* and does not involve political matters, and because their action is a civil claim instead of a criminal action, the *Brandenburg* test for incitement should be relaxed. This Court's precedents offer no support for these arguments.

Petitioners, joined by the *amicus curiae,* argue that even though the August 1981 issue of *Hustler* is not constitutionally obscene, this article is not entitled to the full protection of the First Amendment because of the contents of the rest of the magazine. The record does not support the Petitioners or the *amicus curiae's* reliance on the other contents of *Hustler* because the only portion of the August 1981 issue of *Hustler* that was admitted into evidence was the article at issue. That is the only evidence properly considered on the nature of the speech involved.

Moreover, even if in evidence, the unrelated contents of *Hustler* cannot serve as a basis for decision. In essence, Petitioners and *amicus curiae* are saying that the article was not a problem in *Vanity Fair,* a magazine that later published a similar article, but it is a problem in *Hustler,* a sexually provocative magazine. This is analogous to

the Village of Skokie's argument that the American Nazi Party could be denied a parade permit because "in the place of Skokie, in these times, *given the content of appellees' views and symbols,* the demonstration and its symbols and speech should be prohibited." *Collin v. Smith,* 578 F.2d 1197, 1201-02 (7th Cir.) *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). The Seventh Circuit refused to authorize such restrictions, which turned on the content of the demonstration, and declared the ordinance restricting the American Nazi march unconstitutional. *See also American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985); *aff'd,* 106 S.Ct. 1172 (1986) (Ordinance restricting sale of "pornography," defined as "graphic sexually explicit subordination of women" was unconstitutional content-related restriction of speech; any balance between value of speech and costs of restriction concerns *categories* of speech (obscenity, fighting words), not the *content* of particular works).

A holding that the article at issue is not protected by the First Amendment because of the unrelated contents of the magazine would violate *Hustler's* constitutional rights of free expression and freedom to choose what to include in its magazine. Such a holding would in essence tell *Hustler* that as long as it persists in publishing its other contents, it cannot discuss serious matters such as the dangerous practice of auto-erotic asphyxia. This cannot be allowed, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). In-

citement based on *Hustler's* unrelated contents violates this maxim and cannot be allowed.

Petitioners also urge that the contents of the article itself do not deserve protection because of their "near-obscenity." The article has already been outlined, and it is appended to this brief. A review of the article reveals it as a serious discussion of a dangerous and disturbing sexual practice and a larger social problem, especially among teenagers. The evidence was that this article was adapted from an article published by a psychiatrist in the *Journal of Child Psychiatry* and that a similar article discussing this practice later appeared in *Vanity Fair* magazine. It is not too difficult to imagine that a similar article could appear in sexual advice columns syndicated in newspapers throughout the United States. This is clearly protected speech.

Freedom of speech is not limited to political expression or comment on public affairs. *Time Inc. v. Hill,* 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Free speech must "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). This includes matters of science, morality, and arts in general. *Id.* Protection does not depend on the value of the speech involved: "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges v. California,* 314 U.S. 252, 269, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

The decisions of this Court show that the First Amendment extends not only to speech that concerns how we govern ourselves, but also to speech that concerns how we conduct ourselves in our personal and social lives, down to the most intimate details. In *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) this Court recognized that motion pictures, even though they are designed to entertain as well as inform, were entitled to First Amendment protection. 343 U.S. at 501. In *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) this Court provided First Amendment protection for advertisements for abortion clinics, recognizing that the advertisement "conveyed information of potential interest and value to a diverse audience." 421 U.S. at 821. And in *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) this Court recognized that contraceptive advertising was protected First Amendment expression. Perhaps most telling against Petitioners' argument is this Court's observation in *Carey* that "At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 431 U.S. at 701. The Court of Appeals appropriately disposed of the argument of Petitioners and *amicus curiae* for differentiation on the value of speech with the observation that

> Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality. If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can

> be identified as 'bad,' all free speech becomes threatened.

814 F.2d at 1024.

Petitioners try to avoid the principles of *Brandenburg* because it involved a criminal action, not a civil claim. But, as already noted, *Brandenburg* articulated the requirements to punish otherwise protected speech, and whether the State punishes speech by criminal sanctions or by allowing civil recovery, it is still censorship. In applying *Brandenburg* in this civil action, the Court of Appeals relied on this Court's observation in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964): "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277. *See Walt Disney Productions, Inc. v. Shannon,* 247 Ga. 402, 276 S.E.2d 580, n.1. (1981), ("For First Amendment purposes, whether an utterance is suppressed under criminal law or penalized under tort law makes no difference.") The Court of Appeals correctly held that *Brandenburg* and *Hess* cannot be discounted merely because they concerned criminal sanctions, because if the State cannot constitutionally punish Respondent's speech with criminal sanctions, it cannot constitutionally do so by allowing civil tort recovery.

Petitioners are then left with the naked argument that the article is dangerous and should not have been published. The Court of Appeals was correct in rejecting this as a basis for decision. Just because speech contains provocative or dangerous ideas does not mean it loses constitutional protection. This is the essence of the First

Amendment. As Justice Harlan observed in *Cohen v. California:*

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *See Whitney v. California,* 274 U.S. 357,375-77 (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' *Winters v. New York,* 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). The Court of Appeals properly protected this interest in its ruling, and its decision should not be disturbed.

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CONCLUSION

The Court of Appeals properly applied this Court's analysis in *Brandenburg* and *Hess* in determinig that the article at issue was constitutionally protected speech that could not serve as the basis for a civil action for wrongful death. The Court of Appeals properly held that Petitioners had not preserved any other ground to support the judgment and that if they had, that ground would have been constitutionally deficient. The Court of Appeals' holding should not be disturbed.

Respectfully submitted,

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APPENDIX A

Editor's Note: HUSTLER emphasizes the often-fatal dangers of the practice of "auto-erotic asphyxia," and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.

• • •

Many sexual pleasures have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy. In keeping with HUSTLER's belief that the repression of natural and healthy urges is physically and emotionally damaging, we present this series of informative articles to increase your sexual knowledge, to lessen your inhibitions and—ultimately—to make you a much better lover.

ORGASM OF DEATH

by Richard Milner

Bobby L. was a bright, fun-loving and seemingly well-adjusted teenager. He got along well with his classmates in a New York City high school, and was never considered the type who would take his own life.

Yet one tragic day his parents found him dead in his bedroom, hanging from a homemade noose attached to the clothes pole in the closet. There were pictures of nude women near his body, and his penis was still dribbling semen. When the coroner arrived, the parents begged him to list the cause of death simply as a "fatal accident."

In recent years Masters and Johnson and other researchers have shown ordinary self-stimulation of the sex organs to be a harmless practice that induces a temporary state of euphoria and physiological release. And Dr. Alfred Kinsey's surveys disclosed that virtually all healthy males and females do it.

But Bobby's method of masturbation was neither healthy nor harmless. As many as 1,000 youngsters—mostly males—die every year in this country by hanging themselves while masturbating. Coroners call the practice "auto-erotic asphyxia" or the "adolescent sexual-asphyxia syndrome"—when they describe it at all.

Typically, the practitioner rigs up a noose—often a rope or a belt—and cuts off his air supply at the height of sexual excitement. The brain, deprived of oxygen, experiences a "high" accompanied by giddiness, light-headedness and exhilaration. Often the practitioner will pass out for a few minutes, then revive. Sometimes, though, he never comes out of it!

Dr. Robert Stein of the Cook County (Illinois) Medical Examiner's Office cites 15 to 20 cases of this latter instance each year in the Chicago area alone. The victims, who usually have ejaculated, are discovered with nooses around their necks. According to Dr. Stein (as quoted in the *Chicago Tribune*), "Great efforts are taken to cover up these cases, and many coroners and medical examiners go along to lessen embarrassment to families" who don't want the true circumstances of death revealed.

For years there was some confusion among medical examiners and insurance companies as to whether these deaths were to be considered accidental or suicides. In an article published in the *Journal of Child Psychiatry*, Stephen Rosenblum and Dr. Myron Faber of San Diego's Balboa Naval Hospital conclude the deaths are really accidental—because the victims have no intention of killing themselves.

Indeed, here lies the real danger of the practice. While it may seem a cheap and easy way of getting "kicks," it is a serious—and often-fatal—mistake to believe that asphyxia can be controlled.

The critical error is to believe that, as long as you don't actually choke yourself (compress the windpipe), you can always regain consciousness. In fact, a little too much pressure on the neck, and you get the barocepter reflex (which refers to little valves in an artery that halt the flow of blood when pressure is applied to the vessel).

This reflex—in the case of the main artery supplying blood to the head, the carotid—leads to rapid unconsciousness, and the victim may then fall on his noose or belt in such a way as to produce hanging and asphyxia, resulting in death. Of course, he will be unaware of this new danger—since he is not conscious.

Vaughn Bode, the creator of the cosmic comic strip "Cheech Wizard," which appeared monthly in *High Times* magazine, died at the age of 33 because of his auto-erotic sexual practices. He was found in his bedroom with his neck through a homemade noose, his genitals exposed.

Later, friends and relatives found more than a hundred empty bottles of butyl nitrite in Bode's room, and they suspect this commonly available legal drug was also implicated in the death. "Vaughn did anything that would get him higher," said a friend. "He snorted these dangerous drugs, used rubber and nooses, put on women's clothing—everything he could think of. And his methods underwent an evolution. He'd mask his eyes, put plugs in his ears, deprive himself one by one of outward sensations. It became a spiritual thing

Illustration by David Mann

App. 1

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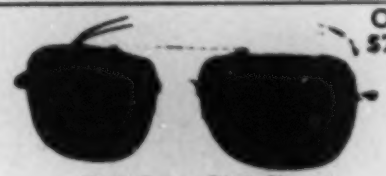

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for him. After a while, he didn't even masturbate—just went after the high."

Of course, yogis and Eastern mystics have long known how to alter consciousness by changing or constricting normal breathing. But Bode hadn't the patience for gradual practices. He wanted immediate gratification, as do many who pursue quick and dangerous highs. "Usually Vaughn came out of it okay after five minutes," his friend recalls. "He always said he just needed to have a chat with the Big Man—'The Management,' he called it. It was a form of spiritual Russian roulette."

Another reported case—this one dealing with the experience of an anonymous 15-year-old male—was recalled by Dr. Faber in the *Journal of Child Psychiatry*. Fortunately, the doctor learned about the youth's habit early enough, and was able to arrange psychotherapy sessions that successfully altered his destructive behavior.

This description is based on Faber's interview with the teenaged patient: "He strips completely, puts on various articles of female clothing (most commonly a bra and panties) and views a large assortment of sexually explicit magazines. He then loops his belt through its buckle, places the loop around his neck and over the clothes pole in his closet, and holds the belt in his other hand. Since he is 5-5, and the clothes bar is exactly four feet from the ground, he *must* lift his legs to be able to hang himself.

"He always places a towel around his neck before putting the belt over it, in order to avoid producing any marks or bruises. . . . Hanging is accomplished for one-half to two minutes and almost without exception is accompanied by ejaculation. Initially, he hanged himself once every other week, but most recently has done it as often as two to four times a week."

One factor pops up again and again in these cases—the use by men of female undergarments or intimate apparel. The relationship between transvestite practices—cross-dressing—and sexual asphyxiation is not clear. Some psychotherapists have attempted to link erotic hangings to early childhood fascination for ropes and chains, to binding with women's undergarments, and to the whole spectrum of adult bondage and sadomasochism.

It has long been known that tying or binding various parts of the body can be sexually stimulating. As pioneer sex researcher Havelock Ellis put it, "Any restraint upon muscular and emotional activities generally tends to heighten the state of sexual excitement." Erotic bondage is also connected to psychological games of sexual aggression, submission and domination. But the basic physiological responses produced by being tied or restrained become sexual in themselves. Alex Comfort writes in *The Joy of Sex*, "Our cultural taboo on all intense extragenital sensations" makes them all the more exciting.

Students of the controversial psychiatrist Wilhelm Reich explain the pleasure of constriction in terms of its effect on "body armoring." Reich believed thoughts, feelings and experiences become "frozen" in our postures and physical attitudes. The slump of a neck, the pattern of breathing, the way the spine is held—all reflect the defensive layers we have accumulated around our private, inner cores.

It is not without reason that the French term for orgasm is *le petit mort*—the "little death." During moments of orgasm the ego ceases to exist. There is no "I"—only an overpowering feeling of pleasure and oblivion, not unlike the high produced by drugs or some religious rites. Death and orgasm are literally connected too. It has been known for centuries that executed criminals are often observed to ejaculate at the point of death.

One recent study of the relationship between bondage and suicide reported "self-asphyxiation is a common component . . . in the bondage syndrome. Most bondage practitioners know about hanging thrills, but are frightened and stay away from this obvious danger to life. Several said they are saving hanging for the ultimate scene, or eventual suicide."

Such awareness of the danger of death marks a difference between adults and youngsters who contemplate strangulation as a means of getting off. Older people know they are flirting with death; teenagers may think it's just a cheap high that won't harm them any more than a ride in a fast car. Youngsters who practice it tend to be heterosexual experimenters, while older practitioners tend to be gay or bisexual individuals who seek out partners in order to reduce the risk. There are few reported instances of women dying from auto-asphyxiation, but they do exist—about one in every 50 cases.

It's a fact: People practicing this form of sexual stimulation *do* kill themselves. Recognizing the syndrome early is one way to stop a friend or relative before he or she takes the ultimate one-way trip. But it is also important to know—beyond a doubt—that auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe.

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In The

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE HERCEG and ANDY VINES,
Petitioners

v.

HUSTLER MAGAZINE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, WITH BRIEF ANNEXED.

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MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, WITH BRIEF ANNEXED.

Charles H. Keating, Jr., (hereinafter referred to as "moving party") respectfully moves, pursuant to Rule 36.1 of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the Petitioners

herein. The consent of the Petitioners has been obtained. The consent of the Respondent, Hustler Magazine, Inc., was requested from counsel for Respondent by phone. In a phone conversation on July 22, 1987, Respondent's counsel stated that Respondent would not consent.

Moving party has a special interest in the Petition for Writ of Certiorari herein, both as the founder of "Citizens for Decency through Law, Inc." (short title "C.D.L."), and as a former member of the 1967 Presidential Commission on Obscenity and Pornography, and the author of one of the dissenting statements from that Commission's report. Moving party's interest in this particular case is the result of moving party's experience as a member of the Presidential Commission.

At page 542-546 of his dissenting statement from "The Report of the Comm-

ission on Obscenity and Pornography", moving party addressed the subject of "EFFECTS OF PORNOGRAPHY" and his unsuccessful effort as a member of the Presidential Commission to have the Commission authorize a study of "the practical aspect of what has been happening -- that is, what the statistics demonstrate regarding police cases, in which a relationship has been found to exist between anti-social conduct and obscenity." The study which moving party advocated is described in detail in a memorandum to Chairman Lockhart, dated August 11, 1969, entitled "MEMORANDUM RE STATISTICAL STUDY OF RELATIONSHIP OF OBSCENITY TO CRIME AND OTHER ANTI-SOCIAL BEHAVIOR", which is set forth in full at pp. 559-582 of the Commission Report as exhibit "C" to the dissenting statement.

///

The focus of moving party's memorandum of August 11, 1969 was placed upon the case histories which had been marshalled in two pilot studies which moving party had personally sponsored, in which law enforcement officers in two California cities were interviewed as to police reports within their personal knowledge, wherein a relationship had been found to exist between anti-social conduct and obscenity. One of those case histories involved the sexual practice of "Auto-erotic Asphyxiation" and was described by Lieutenant Ernest Vandergrift at page 574 as follows:

> 16. Sex Perversion - Suicide - H---- Case - D.R. 64-5456. "The body was discovered by the wife of the suspect, who is 24 years old. He attended law school. She found him lying on the bed in a supine position, face down and naked. On top one end of a rope was tied to his ankles, the other end was around his throat. A pair of white sox (sic) kept the rope from connection with

his skin as did a towel around his throat. She screamed and the neighbor came in and cut the ropes. The Fire Department tried resuscitation and called the police. When the police arrived, his ankles were still trussed but rigor mortis had set in. Just above him on the bed were 5 or 6 nudist magazines (2 were Sun and Sport), all open to female forms. When he was moved, it was found he had a contraceptive on and had an emission on the bed. All windows, doors were locked. The neighbors had seen him enter and he had no visitors until his wife came home. In the investigation with the Coroner's office the Los Angeles County Sheriff disclosed a type of masochism -- in which sexual excitement is reached upon tying oneself up and hanging to almost a point of blackout -- substantiated by psychiatry and case histories. Interrogation of suspect's wife revealed that ever since their marriage he was unable to obtain satisfactory intercourse without the use of ropes, being tied up and subjected to this before he could perform satisfactorily. He had received psychiatric help for 8 years. The death was accidental -- he did not intend to do it. In Los Angeles County, cases of this type occur about 6 times a year in which the defendant goes too far. He had sox (sic) on and a towel on his throat to prevent rope marks."

///

When the details of the above case histories on "Auto-erotic asphyxiation" were first brought to our attention, moving party and the attorney who was conducting the two pilot studies reacted with incredulity, even though each had ten years of experience in the area of obscenity litigation -- the abnormal sexual practice of "Auto-erotic asphyxiation" was that uncommon in 1969. However, at that time, both readily understood and accepted the fact that abnormal sexual behavior of that order did exist in the world, that it must have been as old as man, and that additional data would, more than likely, be found in scientific treatises on abnormalities, such as the works of Krafft-Ebbing, author of "Psychopathia Sexualis" (1886).

The "incredulity" which was expressed in 1969, was understandable, but was not

then a cause for alarm. That was so because the law was eminently clear that such discussion belonged in scientific treatises, and that, when and if one ventured into that area of "discussion", as Hustler Magazine did in this case, the right to treat such matters was not a broad First Amendment right to broadcast the abnormality indiscriminately to the community at large, as the Court of Appeals erroneously holds in this case. Three years earlier, this Court had specifically held to the contrary, in affirming the five year jail sentence of Ralph Ginzburg, where the actor's conduct was held to constitute "pandering"; i.e., "one who advertises and sells a work on the basis of its prurient appeal". See, in this regard, the opinion of Justice Learned Hand, often called the father of modern obscenity law, speaking in United

States v. Rebhuhn, 109 F.2d 512, cited with approval by Associate Justice Brennan of this Court in Ginzburg v. United States, 383 U.S. 463, 472-475 (1966), appearing hereinafter at page 19. of this amicus curiae brief.

Moving party submits that the right to discuss sexual matters is not unrestricted as the Court of Appeals' opinion below holds, and that it ceases to be so when the facts demonstrate, as shown in the record herein, that the actor is "pandering" in obscenity. In such a case, Brandenburg v. Ohio, 395 U.S. 444 is inapposite. The controlling precedents are Roth v. United States, 354 U.S. 476, 485-486 (1959); U.S. v. Rebhuhn, 109 F.2d 512 and Ginzburg v. United States, 383 U.S. 463, 472-475 (1966).

The Court of Appeals, in failing to recognize the "pandering" conduct of

Hustler Magazine as being of paramount importance to its analysis, is clearly in error. That the court below was unanimous in its error should concern this Court, and should cause its members to question whether the obscenity opinions of this Court have not resulted in the elevation of sexual matters to a position of unwarranted importance. The increase in the number of news items which report on tragic events similar to the death of Troy Daniel Dunaway, see news items appearing at appendix "A" to this amicus curiae brief, -- all innocent victims of pornography -- suggests that the societal value which underpins Judge Learned Hand's analysis, is seriously misunderstood by the Federal Judges, and that such misunderstanding can be traced to this Court's opinions, and its failure to articulate the societal values expressed by Justice Learned Hand.

The failure of Circuit Judge Alvin B. Rubin's opinion to say one word of what Hustler Magazine contains is inconsistent with the thoughtful analysis and values expressed by Judge Learned Hand in U.S. v. Rebhuhn, supra, as expressly approved in Ginzburg v. United States, supra. Further, moving party submits that had concurring and dissenting Circuit Judge Edith H. Jones been cognizant of the constitutional values which are inherent in Rebhuhn and adopted by reference in Ginzburg, hers would have emerged from the court's deliberation as the majority opinion, and the judgment below would have been affirmed.

The arguments presented herein, re an "incitement to prurient interest" in this amicus curiae brief, is not discussed in either the opinions below or in the

Petition for Writ of Certiorari on file herein and, therefore, moving party respectfully requests that he be granted leave to file this brief amicus curiae setting forth the same, for such assistance as it may provide to the individual Justices sitting herein. Because the August, 1981 copy of Hustler Magazine is a material part of the arguments of amicus curiae, a copy of the same is being lodged with the Clerk of this Court, concurrently with this motion.

DATED: July 18, 1987

Charles H. Keating, Jr.
Moving Party

James J. Clancy
Counsel for Moving Party

STATEMENT OF FACTS

The facts are set forth in Circuit Judge Alvin B. Rubin's opinion as follows (see Petition for Writ of Certiorari at pp. 2A-5A):

In its August 1981 issue, as part of of a series about the pleasures -- and dangers -- of unusual and taboo sexual practices, Hustler Magazine printed "Orgasm of Death", an article discussing the practice of autoerotic asphyxia. This practice entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm. The article included details about how the act is performed and the kind of physical pleasure those who engage in it seek to achieve. The heading identified "Orgasm of Death" as part of a series on "Sexplay", discussions of sexual pleasures (that) have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy" and are presented "to increase (readers') sexual knowledge, to lessen their inhibitions and -- ultimately -- to make them much better lover(s)."

An editor's note, positioned on the page so that it is likely to be the first text the reader will read, states: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia', and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here

solely for an educational purpose."

The article begins by presenting a vivid description of the tragic results the practice may create. It describes the death of one victim and discusses research indicating that such deaths are alarmingly common: as many as 1,000 United States teenagers die in this manner each year. Although it describes the sexual "high" and "thrill" those who engage in the practice seek to achieve, the article repeatedly warns that the procedure is "neither healthy nor harmless", "it is a serious -- and often-fatal -- mistake to believe that asphyxia can be controlled", and "beyond a doubt -- ...auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe." The two-page article warns readers at least ten different times that the practice is dangerous, self-destructive and deadly. It states that persons who successfully perform the technique can achieve intense physical pleasure, but the attendant risk is that the person may lose consciousness and die of strangulation.

Tragically, a copy of this issue of Hustler came into the possession of Troy D., a fourteen-year-old adolescent, who read the article and attempted the practice. The next morning, Troy's nude body was found, hanging by its neck in his closet, by one of Troy's closest friends, Andy V. A copy of Hustler Magazine, opened to the article about the "Orgasm of Death", was found near his feet.

///

Invoking the diversity jurisdiction of a federal court, Troy's mother, Diane Herceg, and Andy V. sued Hustler to recover damages for emotional and psychological harms they suffered as a result of Troy's death and for exemplary damages. Their original complaint alleged that Hustler was responsible for Troy's death on grounds of negligence, products liability, dangerous instrumentality, and attractive nuisance. In response, Hustler filed a motion to dismiss the complaint for failure to state a claim. The district court granted Hustler's motion on the basis that Texas law did not support some of the claims and others were barred by the first amendment, but it noted that the first amendment did not bar claims based on incitement and that it was "conceivable that plaintiffs could prove facts showing that Hustler's article was 'directed to inciting or producing' (Troy's death and) was 'likely to incite or produce' the death." It therefore granted leave to the plaintiffs to amend the complaint "to add an allegation of incitement." The plaintiffs subsequently filed an amended complaint reasserting the claims previously raised and adding an allegation that Troy had read the article and was incited by it to perform the act that resulted in his death. Hustler responded by filing a motion for summary judgment. The district court treated the motion as a motion to dismiss, granted the motion, and dismissed the suit insofar as it was based on any theory except incitement.

The incitement claim was then tried before a jury. Expert witnesses testified on behalf of both the plaintiffs and the defendant about the psychological implications of Troy's behavior and whether the magazine article implicitly advocated

the practice it described or was likely to incite readers to attempt the procedure. The jury returned a verdict in favor of the plaintiffs awarding Diane Herceg $69,000.00 in actual damages and $100,000.00 exemplary damages and awarding Andy V. $3,000.00 for the pain and mental suffering he endured as the bystander who discovered Troy's body and $10,000.00 exemplary damages. Hustler moved for a judgment notwithstanding the verdict or for a new trial, and the plaintiffs moved to amend the judgment to provide for pre-judgment interest. The trial court denied both motions.

Hustler appealed, and the Court of Appeals reversed the judgment on the grounds that tort liability could not be imposed on Hustler Magazine, pursuant to the theory that the article was an "incitement" to attempt a potentially fatal act, without impermissibly impinging upon freedom of speech.

STATEMENT OF THE CASE

The primary issue in this Petition is set forth in Circuit Judge Alvin B. Rubin's majority opinion as follows: (see Petition for Writ of Certiorari at page 8a):

> "While the plaintiffs alleged several different bases of liability in their original amended complaint, the issue tried was the imposition

> of liability on the basis of incitement, and that is the sole basis for the verdict. The question before the Court, therefore, is whether, as a matter of law, the language of 'Orgasm of Death' may be defined as incitement for purposes which would remove that speech from the purview of first amendment protection..." (our emphasis)

REASON FOR GRANTING THE WRIT

I

THE RIGHT OF A STATE GOVERNMENT TO AUTHORIZE REDRESS FOR TORTIOUS CONDUCT IS FUNDAMENTAL TO CIVILIZED SOCIETY.

The right of a severely injured party to obtain redress in a court of law against the person whose conduct clearly caused the injury is fundamental to civilized society. The right was won only after a centuries-long struggle against self-help, blood-feud, and anarchy. 1 Pollock and Maitland, The History of English Law. 46 (Legal Classics edition 1982).

II

PETITIONERS' THEORY THAT HUSTLER MAGAZINE "INCITED" THE DECEASED TO ENGAGE IN EXCEEDINGLY DANGEROUS CONDUCT WHICH WAS LIKELY TO RESULT IN, AND DID IN FACT RESULT IN, HIS DEATH, CONSTITUTES A VIABLE GROUND FOR RECOVERY UNDER STATE TORT LAW. THAT ISSUE IS NOT BEFORE THIS COURT.

Petitioners' theory of the case at trial was that Hustler stimulated, enticed, or "incited" the deceased to engage in exceedingly dangerous conduct which was likely to result in, and did, in fact, result in his death. The jury believed petitioners' theory of the case, and the Court of Appeals found the evidence sufficient to support the facts (as opposed to mixed findings of fact and law) found by the jury. 814 F.2d 1021. The Court of Appeals further implicitly assumed that petitioners' theory constituted a viable ground for recovery under state law. See, here, Petition

for Writ of Certiorari at page 7.

III

THE COURT OF APPEALS APPLIED THE WRONG TEST. BRANDENBERG v. OHIO IS INAPPOSITE. A TORT ACTION BASED UPON "INCITATION" TO THE PRURIENT INTEREST IS CONTROLLED BY U.S. v. REBHUHN AND GINZBURG v. UNITED STATES.

The Court of Appeals applied the wrong test. Brandenberg v. Ohio, 395 U.S. 444 is inapposite. Brandenberg is a test which is applied to speech which is assumed to be protected by the first amendment, but which also involves "incitation" to imminent lawless activity.

Brandenberg has no application to speech which is outside first amendment protection for other reasons. It does not apply to "incitations" to the prurient interest; that is, it does not apply to subject matter: (1) which is obscene per se or (2) which "panders" to obscenity.

Incitations to the prurient interest in the form of obscenity per se are controlled by Roth v. United States, 354 U.S. 476, 485-486 (in Alberts, the trial Judge applied the test laid down in People v. Wepplo...whether the material has a substantial tendency to deprave or corrupt its readers by "inciting" lascivious thoughts or arousing lustful desires...") (1957); and Miller v. California, 413 U.S. 15 (1973).

"Pandering" is also outside the area of "free speech". Incitations to the prurient interest in the form of "pandering" to obscenity are controlled by U.S. v. Rebhuhn, 109 F.2d 512, cited with approval in Ginzburg v. U.S., 383 U.S. 463, 472-474:

> "The decision in United States v. Rebhuhn, 109 F.2d 512, is persuasive authority for our conclusion. That was a prosecution under the predecessor to section

1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written ..." 109 F.2d at 514. But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but ... woefully misused them, and it was that misuse which constituted the gravamen of the crime.' Id., at 515. Speaking for the the court in affirming the conviction, Judge Learned Hand said:

> ... The works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications.
>
> ... However, in the case at bar, the prosecution succeeded ... when it

showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no (fact finder) could have failed to pierce the fragile screen, set up to cover that purpose. 109 F.2d, 514-515. (our emphasis)

IV

BEFORE THE COURT OF APPEALS MAY REVERSE, ON FIRST AMENDMENT GROUNDS, A JURY VERDICT WHICH AUTHORIZES REDRESS FOR TORTIOUS CONDUCT PURSUANT TO A VIABLE GROUND FOR RECOVERY UNDER STATE LAW, IT MUST MAKE AN INDEPENDANT EXAMINATION OF THE WHOLE RECORD, INCLUDING THE CHARACTER AND CONTENT OF THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE.

The Court of Appeals failed to perform its duty and obligation to make an independant examination of the the whole record in order to make

sure " that the judgment does not constitute a forbidden intrusion on the field of free expression." Perforce, this includes an examination of the character and content of the August, 1981 edition of Hustler Magazine, to determine, whether on the one hand, the magazine is, in fact, entitled to free speech protection or, on the other hand, is outside the protection accorded free speech either because: (1) the magazine is obscene per se; or (2) the magazine is pandered as obscenity; that is, it is manufactured, promoted, distributed, etc., for the purpose of "inciting" the prurient interest. See Justice Harlan's opinion in Roth v. United States, 354 U.S. 476, 497-498, 1 L.Ed.2d 1498, cited with approval in Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 506, fn. 25, 80 L.Ed.2d 502

at 520, fn. 25 (1984). See, also, Roth v. United States, 354 U.S. 476, 485-486, 1 L.Ed.2d 1498, 1507-1508 (1957). (In Alberts, the trial judge applied the test laid down in People v. Wepplo...whether the material has a substantial tendency to deprave or corrupt its readers by "inciting" lascivious thoughts or arousing lustful desires...); U.S. v. Rebhuhn, 109 F.2d. 512 (A prosecution... brought in the context of pandering of publications assumed useful to scholars and members of learned professions), cited with approval in Ginzburg v. U.S., 383 U.S. 463, 472-474 (the prosecution succeeded... when it showed that the defendant had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit).

V

THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE IS PER SE OBSCENITY. REASONABLE MINDS WOULD NOT DIFFER AND ALL REASONABLE PERSONS WOULD AGREE THAT HUSTLER IS OBSCENE AS A MATTER OF LAW (NOT FACT) UNDER THE FEDERAL STANDARDS SET FORTH IN MILLER v. CALIFORNIA.

Where obscenity per se exists, no further evidence is necessary on that issue, inasmuch as the court takes judicial notice of the fact that such finding is incontrovertible. See Mitchum v. State of Florida, 251 S.2d 298 (August 13, 1971), citing the federal cases United States v. Wild, 422 F.2d 34 (2nd Cir., 1970), Cert.den. 402 U.S. 986; United States v. Womack (Womack v. United States), 111 U.S. App.D.C. 8, 294 F.2d 204, 205-206, Cert.den. 365 U.S. 859; Kahm v. United States, 300 F.2d 78 (5th Cir.) Cert.den. 369 U.S. 859 and

Collins v. State Beverage Department, 239 S.2d 613 (Fla.App. 1970).

In Morris v. United States, 257 A.2d 341 (December 2, 1969), that court voiced the following test for material which was "obscene per se", i.e., obscene as a matter of law:

> "It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra, Hudson, supra. In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the government on its case in chief need not offer any evidence of national community standards..."

See, also, Wilhoit v. United States, 279 A.2d 505, Cert.den., 30 L.Ed.2d 546 (December 14, 1971) (Douglas would grant certiorari and set the case for

argument); U.S. v. One Reel of Film, 41 F.2d 206, 209 (July 16, 1973).

In Boreta Enterprises, Inc. v. Department of Alcoholic Beverage, 2 Cal. 3d 85, 84 Cal.Rptr. 113, 123 (1970), Justice Sullivan writing for a majority of the California Supreme Court acknowledged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "per se" contrary to public morals. The recent decisions of the majority of this Court in Paris Adult Theater, Inc. v. Slaton, 413 U.S. 49, at page ___ (1973) and Kaplan v. California, 413 U.S. 115, 37 L.Ed.2d 491, 498 (1973) placed the validity of the concept of "obscenity per se" beyond peradventure.

A casual examination of the character and content of the August, 1981 edition of Hustler Magazine, a copy of which has

been lodged with the Clerk of this Court, discloses that Hustler Magazine is hard-core pornography under the federal standards expressed in Miller v. California, supra. Reasonable minds would not differ and all reasonable persons would agree that the August, 1981 edition is obscene per se. Pope v. Illinois, 481 U.S. ___ (May 4, 1987).

VI

THE ARTICLE ENTITLED "ORGASM OF DEATH" IN THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE AT PAGES 33-34 IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION. IT CLEARLY CONSTITUTES "PANDERING" UNDER GINZBURG v. UNITED STATES.

It seems clear beyond peradventure that Troy Daniel Dunaway was not reading "Orgasm of Death" at the instant of his death due to auto-erotic asphyxiation. The "incitement" just prior to the instant of death was undoubtedly derived from other portions of Hustler. See,

here, the copy of the August, 1981 edition which has been lodged with the Clerk of this Court.

Viewed abstractly, "Orgasm of Death" is not a legitimate scientific treatise on sexual practices. See the opinion of Circuit Judge Edith H. Jones at pp. 21(a) - 22(a) of the Petition for Writ of Certiorari. Even if it were so constructed by removal of the offending portions, such article would not acquire free speech protection under the circumstance of its comingling with the other hard-core pornographic articles in Hustler Magazine. See Flying Eagle v. United States, 285 F.2d 307 (1st Cir., 1961).

CONCLUSION

In reviewing the judgment which awarded damages under state law to redress injuries resulting from an "incitement" to prurient interest, the Court of Appeals should have been governed by the analysis in Rebhuhn

v. United States, supra, as specifically approved by this Court in Ginzburg v. United States, supra. Brandenberg v. Ohio is inapposite. The Court should grant the Petition for Writ of Certiorari and should set the case for briefing and arguments for all of the reasons set forth above.

Respectfully submitted,

Charles H. Keating, Jr.
Amicus Curiae

James J. Clancy
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of July, 1987, copies of the within "Motion of Charles H. Keating, Jr., For Leave to File a Brief as Amicus Curiae in Support of Petitioners, with Brief annexed",were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX "A"

RECENT REPORTS ON THE "PRACTICAL ASPECT OF WHAT HAS BEEN HAPPENING -- SHOWING A RELATIONSHIP TO EXIST BETWEEN ANTI-SOCIAL CONDUCT AND OBSCENITY"

(REFERENCE: MOTION AT PAGE 3 AND PAGE 9, LINES 9 et seq.)

A-1
(The Daily Sentinel, Grand Junction, CO
April 21, 1984)

Boy learning by imitation

Youngster faces murder rap after 'copying' acts in porno slick

ST. PETERSBURG, Fla. (AP) — A 7-year-old boy testified that he and his 9-year-old brother were imitating actions they had seen in their mother's sex magazines when they assaulted an 8-month-old girl, who died of the attack, a lawyer said.

The older boy is on trial in juvenile court for first-degree murder, three counts of sexual battery and aggravated child abuse in the death of Barbara Parks last fall. The boys' mother was babysitting for the infant at the time.

The younger boy testified before Pinellas Circuit Judge Jack Page behind closed doors Thursday. In exchange for his testimony, all but one charge of aggravated child abuse against him is expected to be dropped.

Attorney Tom McCoun, representing the 9-year-old, said the younger boy testified he and his brother, in sexually assaulting the infant with a pencil and coat hanger, were mimicking what they had seen in their mother's sex books.

The mother has acknowledged keeping pornographic magazines and that the boys could have had access to them.

McCoun said he wanted the older boy to go to trial because the boy simply wasn't a murderer and the blame shouldn't rest on him.

"What I'm attempting to point out is that there are a whole lot more people to blame than my client. You've got parents who are totally irresponsible ... a home environment beyond description," said McCoun.

The boys have been held at the Pinellas County Juvenile Detention Center since Sept. 15, shortly after the baby died. Their names have not been made public.

The infant, who suffered Down's Syndrome and had a defective heart, was found on the floor in a bedroom where the two young boys were sleeping. She died shortly afterward.

Pinellas Medical Examiner Joan Wood testified that the cause of death was "blunt trauma" to the chest and abdomen, which she said was consistent with one of the boys kneeling on the child. She also said that the infant's heart problem was a contributing factor.

In open court, the 24-year-old mother of the boys testified that she was asked to mind little Barbara by the baby's grandmother, Ulla May Lee, the night of Sept. 14, 1983.

The baby's mother, Diane Lee, 19, testified that when she picked the infant up later that night, she noticed her body was limp and that she had a blackened eye, a nose bleed and darkened lips. Her shirt was torn and her finger looked like it had been bitten, she said.

The infant died shortly before midnight, she said.

(Sacramento Bee -- April 18, 1984)

Boy Charged With Assaulting Girl On Pool Table As Others Watched

By Todd Heath

PROVIDENCE, R.I. (AP) — A 12-year-old boy was arraigned Tuesday on charges that he sexually assaulted a girl on a pool table while other children watched, and officials said he may have taken the idea from watching the Big Dan's rape trial on television.

"The kid unfortunately watched too much stuff on TV," said Jack McMahon, head of the attorney general's juvenile prosecution unit. The girl who was allegedly assaulted is 10 years old.

The unidentified Pawtucket youth pleaded innocent to first-degree sexual assault in Family Court and was voluntarily undergoing counseling, McMahon said. He has been released to his parents.

McMahon described the boy as non-violent and "pint-sized at about 4 feet tall." He described the incident as "a good kid gone awry" and said the youth apparently already has learned his lesson. A pretrial hearing was set for May 4 and a trial for May 21.

Detective Stephen West said the boy was accused of making the 10-year-old girl perform oral sex then forcing her onto a pool table and further assaulting her. The attack came March 26, the same day four men were given sentences ranging from six to 12 years on charges of aggravated rape in Massachusetts.

In that case, authorities said a woman was held on a pool table and raped March 6, 1983, at Big Dan's Tavern in New Bedford, Mass., while other bar customers looked on. At Superior Court trials held in Fall River, Mass., two other men were acquitted.

(Sacramento Bee -- April 18, 1984)

The trials were the focus of national attention and large segments of it were carried live on Cable News Network.

According to West, the boy's mother said her son saw coverage of the trial. It was unclear how much the boy saw or whether he watched the trial on CNN or saw other TV news reports.

The boy was playing with four girls in his back yard when he asked one of them to his basement to play pool, West said.

The other girls were looking through a window and continued to talk about the incident for several days, West said. One of the girls' mothers, a friend of the victim's mother, overheard the conversation.

The victim's mother then approached the boy's family but was unsatisfied with the results, West said. She asked police to file charges.

McMahon and West said they did not know how severely the victim was affected.

Brown University lecturer Barbara Tannenbaum, who wrote her doctoral dissertation about the effects of television on children, said it would not be the first time a child viewed something on TV and then re-enacted it.

"And when you talk about news, in some ways it has more impact because it's real life," she said.

(The Dallas Morning News -- March 22, 1985)

Children attacking children

Rise in sex assaults by youngsters seen

By Melinda Henneberger
Staff Writer of The News

Two Dallas boys were held for questioning in an alleged sexual assault Wednesday of a 6-year-old girl, but were released because Texas law says investigators couldn't file charges.

The boys are 8 and 9 years old.

"They can't be prosecuted in a criminal court — I can't file a case with the DA's office," said youth investigator A.J. Watkins. Juveniles under the age of 10 are not criminally liable for their actions, he said.

The seriousness of the assault shocked police and members of the victim's family, who said the girl sustained a tear in her cervix and was treated and released from Parkland Memorial Hospital.

"I was kind of surprised," Watkins said. "Something this serious with kids this young is just not that common."

"I never thought it would happen to my child," the girl's mother said.

Rape crisis officials said the incident is one of a growing number of sexual assaults on children by other children.

"It's not infrequent," said Dallas County Rape Crisis Center Associate Director Jan Delipsey. She said she recently had a case in which a 5-year-old boy sexually assaulted a 3-year-old.

Ms. Delipsey said that, of the 40 or 50 cases of sexual assault involving children that are handled by the center each month, three to six cases involve incidents of children under the age of 12 sexually assaulting other children.

Although no statistics on the incidence of children sexually assaulting other children are available, rape crisis workers see that caseload rising for several reasons, she said.

"It's increased over the last few years, and a lot of that is the awareness that there is help available. But, too, as a society we're not dealing efficiently with adult perpetrators, so as the cycle continues, it (children sexually assaulting other children) will grow proportionately."

When children are sexually abused, she said, the incidence of their "acting out what's been done to them" with other children also increases.

Sexual abuse of children increased by more than 50 percent last year alone, she said, rising somewhere between 30 and 33 percent from 20 percent of all sexual assaults reported to the county center.

(The Dallas Morning News -- March 22, 1985)

Many of those incidents are never reported to the police, who refer such cases to Dallas County child welfare officials, officials said.

"I can't remember the last time I had a case like this," Watkins said.

"Rape crisis probably gets a lot of cases that we never see because they're not reported to police," said David Chassey, director of the child welfare program. "We don't get that many."

In Wednesday's incident, the 8-year-old boy involved "has done this before," said a witness and the victim's mother. No previous incidents were reported to police, and the suspects' parents doubt Wednesday's alleged assault ever occurred, either.

"I'm not concerned at all because it never happened," said the mother of the 8-year-old boy.

"I saw the other boy pulling his pants up, but the only thing I saw my boy doing was playing with a truck," said the 9-year-old suspect's father, who was at home when the incident occurred in his living room. He told police he thought the children were "just playing" under the dining room table, but both children told police they assaulted the girl — first in the back yard and later under the table, police said.

The 8-year-old reportedly began abusing boys and girls in the neighborhood after he saw some pornographic movies, said the witness and the victim's mother.

Exposure to pornography is a "passive form of abuse," Ms. Delipsey said, and can also continue the cycle of abuse.

To break the cycle, Ms. Delipsey recommends awareness and counseling rather than punishment.

"They should seek therapy and not be quick to label the child as bad," she said.

"The first concern is to make sure they're not being abused by an older person. We tell them, 'Your body belongs to you, and if an adult tries to touch it, it's because that person has probiems.'"

Child welfare workers treat "each case as special and individual," said investigator Larry Billingsley.

After an investigation, child welfare workers may recommend several solutions — ranging from counseling to placement in a foster home or in the children's ward of Terrell State Hospital, he said.

(Dover, Ohio, Times Reporter -- February 1, 1985

Strasburg boy given probation in sex case

A Strasburg teen-ager, who was found delinquent for having sexual contact with five young children, will remain at home and not be placed in a treatment center.

Tuscarawas County Juvenile Court Judge George Demis Thursday placed the 14-year-old boy on two years probation and ordered that he and his family continue counseling. The teen also is to serve 60 days in a summer work program and must observe a curfew and improve his grades.

Demis added, however, that the youth will be placed in a treatment center if he commits any similar acts again. The judge said he will review the case in June.

In December, Demis ruled the boy delinquent by gross sexual imposition for incidents with five children, ages 2 to 5, between July 4 and Aug. 18. Testimony from two mothers and one victim indicated the incidents took place in the boy's home, where his mother was babysitting the other children. The mother reportedly was not in the house at the time.

AT THURSDAY'S hearing, Demis ordered that the family obtain a new counselor after Dr. Mary Katherine Villwock, a New Philadelphia psychologist who has been counseling the boy, testified that she didn't believe all of the allegations against him were valid.

Demis said he believed Villwock was not helping the boy by supporting his denials about the incidents.

Villwock said she thought some of the boy's earlier statements — in which he indicated he had sexual contact with some of the children — were made because he felt pressured by an employee of the Tuscarawas County Department of Human Services.

The boy's attorney, Willard Hanner, and assistant county prosecutor Wendy Rockenfelder agreed with recommendations from Villwock and other psychologists that the boy should remain with his family.

Villwock described the boy as introverted but said she believes he has matured and is developing a better relationship with his family. She said the boy told her he was involved in an incident with one of the children, but that it did not involve sexual contact, and that he had been influenced by programming on a pay television channel. Demis criticized the parents for subscribing to the channel, although they said they have canceled it.

(Columbus Citizen Journal -- April 19, 1985)

Rape charge shocks community

By THOMAS HOLDEN
CJ Staff Writer

The sun set at 6:49 p.m. on March 28, about the time three Hilliard boys headed home from an afternoon of flying kites. They heard what sounded like crying.

The sounds came from beneath the stage of a small amphitheater in Municipal Park, a pleasant, spacious place with a small man-made pond behind the open-air theater.

When the three investigated the sounds, they found a boy hiding under the cramped space of the stage with a collection of pornographic magazines. Inside was a foam mattress and a can of oil that had been used as a makeshift light.

Twelve days later, on April 8, the 12-year-old boy who had been hiding under the stage was charged with two delinquency counts of raping one of the three youngsters who had been flying kites. Another one of the three boys was charged with two counts of complicity in the incident.

The victim is 10 years old and retarded.

The crime has shocked the community and left police wondering how it could have happened.

"I've been in law enforcement for 18 years, and I've never seen a homosexual rape between two boys so young before," Hilliard Police Lt. Ron Bush said yesterday. "I just don't know what to attribute it to."

Bush gave this account of the crime:

The 12-year-old who had been hiding under the stage was imitating the sounds of someone crying in an effort to attract attention. After the three younger boys found him, the 12-year-old joined the trio and they headed south toward Snow Hill on their way home.

Sometime between 7 p.m. and 7:30 p.m., with darkness setting in, the 12-year-old said he wanted to have sex with the 10-year-old, Bush said.

Based on interviews with the four, Bush said he determined that the 10-year-old refused until another boy, who is 11, picked up a stick and hit the retarded boy until he consented.

At that point, a second 11-year-old ran home to tell his mother. And while he was gone, Bush said, the oldest boy raped the retarded youth on the side of the hill while the stick-wielding 11-year-old watched.

Bush said the older boy is large for his age, about 5 foot, 10 inches tall, and 200 pounds. The victim is smaller, about 5 foot, 6 inches.

"If it hadn't been for the 11-year-old who ran home to tell his mother, we probably never would have found out what happened," Bush said.

After the crime, police had the entryway to the stage boarded shut.

The incident made the front page of The Northwest News, Hilliard's weekly newspaper. Wayne Brown, the editor, said several people called about the newspaper's account of the crime to complain about the detailed description.

Otie Blankenship, who owns Otie's Town Pub, a popular restaurant and tavern near the center of town, said, "People at the bar were kind of shocked. You know, it makes you stop and think about all the times you've said it could never happen here. ... I've been here 25 years, and I've never heard of anything like this happening here before."

Bush said all of the boys are from good families whose parents work hard and care for their children. None of them has any previous contact with the police.

(Columbus Citizen Journal -- April 19, 19

Boy, 10, charged with rape

Youngest

Officers arrested the boy on the basis of information furnished by witnesses who saw him run from the scene. One witness followed him to his house and called police.

London officers say the child is the youngest rape suspect they have ever arrested.

"After we talked to his parents and took the boy into custody, we searched his room," says a police spokesman.

"We found dozens of pornographic magazines, nude photos, and other sexually-explicit materials. His parents were shocked. They didn't have any idea how the stuff got there.

police she was on her way home from school when the boy, wearing a mask, jumped out of the bushes and grabbed her.

He pulled her into the row of hedges, she says, and proceeded to tear off her clothing while threatening her with a penknife.

A psychiatrist who examined the boy following his arrest says, "The child told me he got his ideas from reading magazines with pictures of nude men and women.

"He said he wanted to be like the men he saw in the magazines and on TV."